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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 899. ~~552~~ ~~268~~ 31

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BRADLEY BARLOW AND J. L. SANDERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MAY 10, 1886.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Affidavit in attachment	5	3
Summons	7	4
Marshal's return	9	5
Writ of attachment	10	5
Marshal's return	12	6
Exhibit A. Certificate of attachment	12	6
Order on defendant Sanderson to answer	15	8
Answer of J. L. Sanderson	15	8
Replication to Answer of Sanderson	20	10
Replication to Answer of Sanderson (2d)	22	11
Order for continuance	23	12
Order granting leave to amend complaint, &c	24	12
Amended complaint	25	12
Exhibit A. Affidavit of J. L. Sanderson, September 30, 1878	33	17
B. Statement as to contract, &c	34	17
C. Contract between United States and Voorhees, March 15, 1878	37	18
Order granting leave to withdraw exhibits	45	24
Alias writ of attachment	46	24
Marshal's return	48	25
Exhibit A. Garnishee summons	48	25
Answer to amended complaint	52	27
Replication to answer	61	32
Order admitting George L. Douglass as attorney for plaintiff	65	34
Hearing	66	34
Verdict	68	35

	Original.	Print.
Motion for new trial	69	36
Order denying motion for new trial, &c	70	37
Bill of exceptions	72	37
Plaintiff's case	72	37
Contract between United States and Voorhees *et al.* March 15, 1878	72	37
Sworn statement of J. L. Sanderson, September 30, 1878	79	42
Exhibit A. Copy of record of route No. 38146, Colorado	79	42
B. Statement of amount paid for mail service on route 38146	81	43
C. Authority from Barlow & Sanderson to Vermont National Bank	83	44
D. Orders of Postmaster-General making fines, &c., against route No. 38146	93	49
E. Map of route 38146	96	53
Testimony of J. L. Kline	97	53
Testimony of George F. Gardner	99	54
Defendants' case	100	54
Record of route No. 38146	102	55
Petition of citizens of Ouray and Hinsdale Counties, &c	105	57
Subcontract, September 28, 1878	110	60
Testimony of J. L. Sanderson	112	61
Bradley Barlow	116	63
Harley Sanderson	121	66
Plaintiff's case in rebuttal	121	66
Testimony of W. W. Stoddard	121	66
Plaintiff's propositions	124	67
Defendants' propositions	126	68
Plaintiff's requests	130	70
Charge to jury	136	73
Exceptions to charge	144	77
Writ of error	147	78
Citation	149	78
Proof of service of citation	149½	79
Clerk's certificate	150	79

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 17th day of December, A. D. 1884, came A. W. Brazee, esq., attorney of the United States for the district of Colorado, and filed in said court a complaint and affidavit in attachment, and sued out of and under the seal of said court a writ of summons and writ of attachment in a certain cause in said court lately pending, wherein the United States of America was plaintiff and Bradley Barlow and J. L. Sanderson were defendants.

And the said complaint is in words and figures as follows, to wit:

Complaint.

In the United States circuit court for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANTS. } Complaint.

The United States of America, plaintiff, complains of the defendants, Bradley Barlow and J. L. Sanderson, and for cause of action says that the said defendants, on the 14th day of August, 1882, were indebted to the plaintiff in the sum of fifty-nine thousand five hundred and
2 ninety-two dollars and ninety-eight cents ($59,592.98) for so much money by the said defendants before that time had and received to and for the use of the said plaintiff, which said sum of money the plaintiff avers was then due and payable, yet the said defendants, although often requested so to do, have not paid said sum of money, nor any part thereof. Wherefore the plaintiff prays judgment against said defendants for the sum of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents ($59,592.98), with interest thereon at the rate of six per centum per annum from the 14th day of August, 1882, together with the costs of this suit.

And for a further cause of action the plaintiff says that from the first day of October, 1878, up to and including the 30th day of June, 1882, the defendants, Bradley Barlow and J. L. Sanderson were subcontractors for carrying the United States mail upon the mail route then known and designated as route number 38146, running from Garland to Ouray, in the State of Colorado, and were duly recognized as such subcontractors by the Postmaster-General. That on the first day of October, 1878, an order was made by the Postmaster-General, affecting said route, as follows:

OCT. 1, 1878.

($8,600.) "1st. Omit service from Mineral Point to Ouray, 10 miles; reduce service four trips per week from Lake City to Mineral Point, 36 miles; change service so as to embrace Barnum between Lake City and Ouray, increasing distance 110 miles, and allow contractor $7,699.65

3 per annum, additional pay, being pro rata, from October 1, 1878. Allow contractor one month's extra pay on service dispensed with.

"2nd. Reduce schedule time from 72 hours to 36 hours from Lake City to Barnum, 110 miles, and allow contractor $15,994.77 per ann., additional pay, being pro rata from Oct. 1, 1878."

That on January 22, 1879, an amendment to said order was made by the Postmaster-General as follows:

"1879, Jan. 22 (673), amend order of October 1, 1878 (8600), so as to pay subcontractor in like amount." That so much of the said order of October 1, 1878, as authorized an additional allowance to the contractor of $15,994.77 per annum for expedition of service upon that portion of the route therein described as "from Lake City to Barnum, 110 miles" (which description is manifestly erroneous, and was intended to read "from Lake City to Ouray via Barnum, 110 miles," but by clerical error was written as above), was made solely upon the basis of a certain statement made and sworn to on the 30th day of September, 1878, by one of the defendants, J. L. Sanderson, which said statement was presented to the Postmaster-General by or in behalf of the said defendants, and a copy of which is hereto annexed, marked Exhibit A, and made a part hereof. And the said additional allowance made as aforesaid was thereafter from time to time paid to the said defendants Bradley Barlow and J. L. Sanderson.

The plaintiff further says that the allegations in the said sworn statement presented to the Postmaster-General as aforesaid, and upon the
4 basis of which the said additional allowance was ordered and payments made as aforesaid, were false and untrue, as the defendants then and there well knew, in this: That it was therein alleged that to perform the service upon said route between Lake City and Ouray on the schedule of 72 hours then existing required 22 horses and 11 men, and that to perform the same service on a schedule of 36 hours would require 66 horses and 22 men, whereas in truth and in fact no additional men or horses were required, nor were any additional men or horses actually employed in performing said service by reason of the expedition of the schedule as aforesaid between Lake City and Ouray. And the said false allegations were designed to mislead and did mislead the Postmaster-General.

And the plaintiff further says that by reason of the false allegations in the statement aforesaid, the plaintiff's officers were induced to pay and did pay the moneys aforesaid from time to time, between the first day of October, 1878, and the 14th day of August, 1882, amounting in the aggregate to the sum of $59,592.98; which sum was paid by the plaintiff's officers to the defendants in mistake of fact and was received by the defendants contrary to the provisions of section 3961 of the Revised Statutes of the United States. Said payments are more fully and at length set out in the statement hereto annexed marked Exhibit B, and made a part hereof. Said Exhibit B also shows the amount which the defendants were lawfully entitled to receive upon the basis of the contract price and of the stock and carriers actually employed.

Wherefore the plaintiff prays judgment for the sum of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents
5 (59,592.98), with interest thereon at the rate of six per centum per annum, from the 14th day of August, 1882, together with the

costs of this suit. That said defendants are residents of the State and district of Colorado, and within the jurisdiction of this court.

(S'g'd) ANDREW W. BRAZEE,
United States District Attorney for the District of Colorado.
(S'g'd) GEO. L. DOUGLASS,
Of Counsel.

(Endorsed:) No. 1663. United States circuit court. The United States vs. Bradley Barlow & J. L. Sanderson. Complaint. A. W. Brazee, U. S. att'y, Denver. Filed Dec. 17, 1884. (S'g'd) Edward F. Bishop, clerk.

And the said affidavit in attachment is in words and figures as follows, to wit:

Affidavit in attachment.

In the circuit court of the United States for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
versus
BRADLEY BARLOW & J. L. SANDERSON, DEFENDANTS.
} Affidavit in attachment.

6 UNITED STATES OF AMERICA,
District of Colorado, ss:

Andrew W. Brazee, attorney of the United States for the district of Colorado, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that the said defendants, Bradley Barlow & J. L. Sanderson, in the above-entitled action are indebted to the said plaintiff, as he is officially informed by certified contracts, accounts, statements, and documents of the Post-Office Department and the Department of Justice, and verily believes, in the sum of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents ($59,592.98) upon contract, as subcontractors for carrying the mail on the mail route No. 38146, running from Garland to Ouray, in the State of Colorado; that they, being such subcontractors, on the 30th day of September, 1878, by the affidavit of said J. L. Sanderson, did falsely pretend and represent to Hon. Thomas J. Brady as, and he then being, the Second Assistant Postmaster-General, that to perform the service on said route No. 38146, between Lake City and Ouray, on the then present schedule of seventy-two hours, required twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it would require sixty-six horses and twenty-two men, and thereafter and from the 1st day of October, 1878, to the 30th day of June, 1882, by reason of said false representations obtained from this plaintiff fraudulently said sum for expediting said route
7 as above stated; that in truth and in fact to perform said service between Lake City and Ouray in thirty-six hours, would not and did not require 66 horses and 22 men, but, on the contrary, would and did require only twenty-two horses and eleven men during the time aforesaid, as defendants well knew; that by reason of the premises for which

this suit is brought, and by false representations and pretences and fraudulent conduct, procured the money of this plaintiff sued for herein.

(S'g'd) A. W. BRAZEE.

Subscribed and sworn to before me, at Denver, in said district, this 17th day of December, A. D. 1884.

{ SEAL OF DIST. CT. U. S., COLO. } (S'g'd) EDWARD F. BISHOP, *Clerk*,

By F. W. TUPPER, *Deputy Clerk.*

(Endorsed:) Gen. No. 1663. Circuit court of the U. S., district of Colorado. The United States versus Bradley Barlow & J. L. Sanderson. Affidavit in attachment. Filed this 17th day of Dec., A. D. 1884. (S'g'd) Edward F. Bishop, clerk; F. W. Tupper, deputy clerk. A. W. Brazee, plaintiff's attorney.

And the said summons, with the marshal's return thereon, is in words and figures as follows, to wit:

Summons.

In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

8 THE UNITED STATES OF AMERICA, PLAINTIFF, }
versus
BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANTS. }

Complaint filed in the clerk's office, this 17th day of December, A. D., 1884.

The President of the United States of America to Bradley Barlow and J. L. Sanderson, greeting:

You and each of you are hereby notified that an action has been brought in said court by the United States of America against you, as defendants, to recover the sum of $59,592.98, and interest thereon from the 14th day of August, 1882, at six per cent. per annum, due from you, the said defendants, to the said plaintiff for money by the said defendants had and received to and for the use of said plaintiff, and for the costs of this suit, as more fully set forth and described in the complaint filed herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within in ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service, and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for said sum of $59,592.98, interest as aforesaid, and costs.

Witness the honorable Morrison R. Waite, Chief Justice of the
9 Supreme Court of the United States, and the seal of the said cir-

cuit court, at the city of Denver, in said district, this 17th day of December, A. D. 1884, and of the Independence of the United States the 109th year.

{SEAL U. S. CIR. C'T COLORADO.} (S'g'd) EDWARD F. BISHOP, *Clerk*,
By CHAS. W. BISHOP, *Deputy Clerk.*

Proof of service.

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, *Dec. 23rd*, A. D. 1884.

I hereby certify that I received the within writ on the 18th day of December, A. D. 1884, and that I have personally served the same upon the said defendant J. L. Sanderson, by delivering to him personally a true copy of the within writ, at Denver, county of Arapahoe, on the 22' day of December, A. D. 1884. As to Bradley Barlow, I am unable to find in my district after diligent search.

This writ, therefore, returned partly executed, as the law directs, this 23rd day of December, A. D. 1884.

(S'g'd) WALTER A. SMITH, *Marshal*,
By SIM. W. CANTRIL, *Deputy Marshal.*

(Endorsed:) Gen. No. 1663. Circuit court of the United States for the district of Colorado. The United States, plaintiff, versus Bradley Barlow et al., defendant. Summons. Filed this 23' day of Dec'r, A. D. 1884. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Andrew W. Brazee, of Denver, attorney for plaintiff.

And the said writ of attachment and the marshal's return thereon is in words and figures as follows, to wit:

Writ of attachment.

In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF, *versus* BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANTS. } Writ of attachment.

The President of the United States of America to the marshal of the district of Colorado, greeting:

Whereas the above-entitled action was commenced in the circuit court of the United States for the district of Colorado, by the plaintiff in the said

action, to recover from the defendants, Bradley Barlow and J. L. Sande'son in the said action the sum of fifty-nine thousand five hundred and
11 ninety-two dollars and ninety-eight cents ($59,592 98/100) lawful money of the United States, besides interest at the rate of six per cent. per annum from the 14th day of August, A. D. 1882, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law:

Now, therefore, you are hereby commanded that you serve a copy of this writ on each of the said defendants, and that you attach and safely keep the lands, tenements, goods, chattels, rights, credits, moneys, and effects of the said defendants, Bradley Barlow and J. L. Sanderson, of every kind within your said district, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above-mentioned, unless the said defendant deposit with you the amount or give you security, by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking. Hereof make due and legal service and return.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 17th day of December, A. D. 1884, and of the Independence of the United States the 109th year.

{ SEAL CIR. C'T U. S. COLORADO. } (S'g'd) EDWARD F. BISHOP,
Clerk,
By CHAS. W. BISHOP,
Deputy Clerk.

12 *Marshal's return.*

Received December 18th, 1884, 10 o'clock a. m.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I have duly executed the within writ by attaching, July 1st, A. D. 1885, in the manner prescribed by law, the property described in Exhibit A, hereto attached, to which reference is hereby made, said Exhibit A being a true copy of the certificate of attachment which was recorded in the office of the clerk and recorder of Boulder County, Colorado, together with a true copy of this writ attached.

(S'gn'd) WALTER A. SMITH,
Marshal,
By SIM. W. CANTRIL,
Deputy Marshal.

EXHIBIT A.

Certificate of attachment Case 1663.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify that by virtue of a certain writ of attachment, to me directed, and issued out of the circuit court of the United States for the

district of Colorado, dated at Denver, in said district, December 17th, A. D. 1884, in favor of the United States of America, plaintiff, and
13 against Bradley Barlow and J. L. Sanderson, defendants, wherein it appears that the said defendants are justly indebted to the said plaintiff to the amount of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents ($59,592\frac{98}{100}$), besides interest at the rate of six per cent. per annum from the 14th day of August, A. D. 1882; and wherein I am commanded to attach and safely keep so much of the estate, real and personal, of the said Bradley Barlow and J. L. Sanderson to be found in my district as shall be of value sufficient to satisfy the said defendant, interest and costs, according to the complaint, and such estate so attached in my hands to secure so as to provide that the same may be liable to further proceedings thereupon according to law, &c., I have this first day of July, A. D. 1885, attached all the right, title, and interest of the said J. L. Sanderson in and to the Slide Lode ledge or deposit, the U. S. patent for which is recorded in book 59, at page 96, of the records of the clerk and recorder of Boulder County, Colorado, and being the same property conveyed to Jarid L. Sanderson by warrant deed from Peter Campbell by William L. Campbell, his attorney in fact, dated March 11th, 1884, and recorded March 25th, 1884, in book 82, at page 155 of said records of the county clerk and recorder of Boulder County, Colorado. Also the Spur Lode ledge or deposit known as lot 335, mineral entry 2322, also the American Lode ledge or deposit, the Ajax Lode ledge or deposit, and the Mexican Lode ledge or deposit, being the same property conveyed to said J. L. Sanderson by Peter Campbell, by William L. Campbell, his attorney in fact, by deed recorded in book 82, at page 277, of the records of the clerk and recorder of Boulder County, Colorado, July 16th, 1884, the U. S. patent for said American Lode ledge or deposit, being recorded in book 59, at page 132, of the records
14 of the county clerk and recorder of Boulder County, Colorado, all of the above and foregoing described property lying, being, and situated in Gold Hill mining district, Boulder County, State of Colorado, and reference is hereby made to the records of Boulder County, Colorado, as above mentioned, for a more particular description of said property, together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining to any and all of the above described property. A true and certified copy of the original writ of attachment is hereto attached.

Witness my hand this 1st day of July, A. D. 1885.

(Signed) WALTER A. SMITH,
United States Marshal, District of Colorado,
By SIM. W. CANTRILL,
Deputy Marshal.

(Endorsed:) Gen. No. 1663. Circuit court of the United States, eighth circuit, district of Colorado. The United States, plaintiff, versus Bradley Barlow et al., defendant'. Writ of attachment. Filed this 21' day of July, A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. A. W. Brazee, of Denver, attorney for plaintiff.

And afterwards, and on, to wit, the 26th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D.

1884, of said court, present the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

15 *Order: Def't Sanderson ruled to answer.*

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } Money demand. 1663.

At this day comes the said plaintiff, by A. W. Brazee, esq., district attorney, and the said defendant, J. L. Sanderson, by J. Q. Richmond, esq., his attorney, also comes.

And thereupon, on motion of the said defendant, it is ordered by the court that the said defendant file his answer herein within sixty (60) days from this day, as he shall be advised.

And afterwards, and on, to wit, the 18th day of February, A. D. 1885, came the said defendant, J. L. Sanderson, by Messrs. Pitkin & Richmond, his attorneys, and filed in said court and in said cause his separate answer to the complaint heretofore filed herein. And the said separate answer is in words and figures, as follows, to wit:

Answer of J. L. Sanderson.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court within and for said district.

16 THE UNITED STATES OF AMERICA
against
BRADLEY BARLOW AND J. L. SANDERSON, defendants.

The answer of J. L. Sanderson, one of the above-named defendants, to the plaintiff's complaint.

First. For answer to the first cause of action defendant says:

A. The said defendant comes and defends the wrong and injury, when, &c., and says that he does not owe the said plaintiff the sum of fifty-nine thousand five hundred ninety-two and $\frac{98}{100}$ dollars ($59,592.98), above demanded, or any part thereof in manner and form as the said plaintiff hath hereof complained against him.

B. Denies that on the 14th day of August, 1882, or at any other time, he was or now is indebted to the plaintiff, either individually or jointly with the above-named defendant, Bradley Barlow, in the sum of fifty-nine thousand five hundred ninety-two and $\frac{98}{100}$ dollars ($59,592.98), or in any sum of money whatever.

C. Denies that he is indebted to the plaintiff in the sum of fifty-nine thousand five hundred ninety-two and $\frac{98}{100}$ dollars ($59,592.98), either individually or jointly with the above-named defendant, Bradley Barlow, for money by either or both of said defendants had and received, before the 14th day of August, 1882, to and for the use of the said plaintiff.

D. Denies that on the 14th day of August, 1882, he, individually
17 or jointly, with said defendant, Bradley Barlow, was indebted to the plaintiff in any sum or sums of money whatsoever, or that the plaintiff ever demanded of this defendant any sum or sums of money as in and by said first cause of action in said complaint contained it is alleged.

Second. For answer to the second cause of action defendant says:

A. Admits that, from the 1st day of October, 1878, up to and including the 30th day of June, 1882, the defendants, Bradley Barlow and J. L. Sanderson, were subcontractors for carrying the United States mail upon the mail route then known and designated as route number 38146, running from Garland to Ouray, in the State of Colorado, and were duly recognized as such subcontractors by the Postmaster-General.

B. That as to whether or not, on the 1st day of October, 1878, an order was made by the Postmaster-General affecting said route, in words and figures as is alleged and set forth in the said second cause of action in said complaint mentioned, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, therefore insist upon strict proof of the same.

C. As to whether or not, on January 22nd, 1879, an amended order was made by the Postmaster-General, in the words and figures as alleged and set forth in the said second cause of action in said complaint mentioned, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, therefore insists upon strict proof of the same.

18 D. Admits that certain orders were made by the Postmaster-General concerning the expedition of mail service on route number 38146, from Ouray to Lake City, but whether or not the said orders were made solely upon the basis of a certain statement made and sworn to on the 30th day of September, 1878, by this defendant, J. L. Sanderson, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, therefore insists upon strict proof of the same.

E. Admits that on the 30th day of September, 1878, this defendant made the certain statement, duly verified under oath, referred to in plaintiff's second cause of action, a copy of which is annexed to said complaint, and marked Exhibit A, but denies that the allegations in said sworn statement so presented to the Postmaster-General, as is averred and set forth in said second cause of action in said complaint mentioned, was false and untrue; on the contrary, this defendant says, that before the expedition of mail service on said route number 38146, there was actually employed in carrying the mail on said route twenty-two (22) horses and eleven (11) men, and that after the expedition of said mail service on said route, as the same was expedited by the Postmaster-General, it required and there was actually employed sixty-six (66) horses and twenty-two (22) men.

F. Denies that by any statement, verified or otherwise, made by this defendant to the Postmaster-General, the said Postmaster-General was misled or in any way deceived thereby, or that this defendant designed to mislead or deceive the said Postmaster-General.

19 G. Admits that the payment, by the officers of plaintiff to the defendants, between the 1st day of October, 1878, and the 14th day of August, 1882, of the sum of fifty-nine thousand five hundred

ninety-two and $\frac{98}{100}$ dollars ($59,592.98), and that the same was paid as additional compensation for extra service performed by the defendants as mail carriers between the times last above mentioned, but denies that the same was paid in mistake of fact, and was received by the defendants contrary to the provision of section 3961 of the Revised Statutes of the United States, or that the officers of plaintiff were induced to pay and did pay the said sums of money by reason of any false allegations in the statement aforesaid.

H. Admits that Exhibit B. annexed to said complaint, contains a true statement of the several amounts of the various sums of money paid to defendants for services performed as subcontractors for carrying the United States mail upon mail route number 38146, but denies that the said statement shows the amount which the defendants were lawfully entitled to receive upon the basis of the contract price, and of the stock and carriers actually employed on said route.

I. This defendant alleges that the amount actually paid to these defendants, as such subcontractors, for services under the original contract, and the subsequent orders of the Postmaster-General expediting the service on said route number 38146, was one hundred and fifty thousand and three hundred fifty-six and $\frac{72}{100}$ dollars ($154,356.72), and that said services so performed were, in fact, worth said sum of money, and the said defendants were entitled to receive the same.

20 Wherefore this defendant prays to be dismissed of this action with his costs in this behalf expended.

(S'g'd) J. L. SANDERSON.
PITKIN & RICHMOND,
Att'ys for defendant, J. L. Sanderson, Pueblo, Colorado.

(Endorsed:) G. D., 1663. Circuit court of the United States, district of Colorado. The United States of America vs. Bradley Barlow and J. L. Sanderson. Separate answer of J. L. Sanderson. Filed Feb. 18, 1885. (S'g'd) Edward F. Bishop, clerk. Pitkin & Richmond, att'ys for J. L. Sanderson.

And afterwards, and on, to-wit, the 26th day of February, A. D. 1885, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its replication to the separate answer of the defendant J. L. Sanderson, and the said replication is in words and figures as follows, to-wit:

Replication to answer of J. L. Sanderson.

UNITED STATES DISTRICT COURT,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANT'.

21 The said plaintiff, for replication to the answer of defendant Sanderson to the second cause alleged in the complaint, denies that after the said expedition of mail service on said route numbered thirty-

eight thousand one hundred and forty-six (38146), that in carrying the mail on said route as the same was expedited by the Postmaster-General, it required, or that there were actually employed, sixty-four horses and twenty-two men in the mail service of defendants on said route, but on the contrary avers that only twenty-two horses and eleven men were employed at any one time by defendants in carrying the mail on said route after the expedition thereof, and denies that the amount actually paid to defendants as such subcontractors for services under the original contract, and the subsequent orders of the Postmaster-General expediting the same on said route number 38146, was one hundred and fifty-four thousand three hundred fifty-six and $\frac{72}{100}$ dollars ($154,356\frac{72}{100}$), but on the contrary avers that the amount so paid for said service was one hundred fifty-five thousand nine hundred and eighty dollars and forty-three cents ($155,980.43); and denies that said service, as measured by said contract and expediting order, was in fact worth said sum of one hundred fifty-four thousand three hundred fifty-six dollars and seventy-two cents ($154,356.72), and denies that said defendants were entitled to receive the same, but on the contrary avers that the said defendant received the sum of fifty-nine thousand five hundred ninety-two dollars and ninety-eight cents of this plaintiff under said contract and the expedition thereof, over and above the sum they were entitled to receive for their service thereunder.

(S'g'd) ANDREW W. BRAZEE,

22 *Attorney of the United States for the District of Colo.*

(Endorsed:) 1663. U. S. district court. The United States vs. Bradley Barlow and J. L. Sanderson. Replication to answer of Sanderson. Filed Feb. 26, 1885. (S'g'd) Edward F. Bishop, clerk. A. W. Brazee, U. S. attorney.

And afterwards, and on, to wit, the 4th day of May, A. D. 1885, came again the said plaintiff, by Henry W. Hobson, esq., its attorney, and filed in said court and in its said cause, its 2nd replication to the separate answer of the defendant, J. L. Sanderson. And the said replication is in words and figures as follows, to wit:

2nd replication to answer of J. L. Sanderson.

In the circuit court of the United States in and for the State and district of Colorado.

THE UNITED STATES
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } Replication.

Now comes the United States of America, by its attorney Henry W. Hobson, and replies to the answer filed in this suit by J. L. San-
23 derson, or to so much thereof as it is necessary for answer to be made to.

It is denied that after the expedition of mail service upon the United States mail route set out in said answer, defendants employed or were obliged to employ or use in and about said route 66 horses and 22 men, but on the contrary it is charged and alleged that there was no increase

either made or necessary in the number of horses and men used in and about said service after said service was expedited.

It is furthermore denied that the sum of $154,356.72 was due to defendants in any way, or that the service rendered by defendants as set out was worth said sum.

Wherefore, having fully replied to said answer, judgment is prayed.

(S'g'd) HENRY W. HOBSON,
Attorney for the U. S.

(Endorsed:) 1663. The U. S. vs. Sanderson & al. 2nd replication. Filed May 4, 1885. (S'g'd) Edward S. Bishop, clerk.

And afterwards, and on, to wit, the 22nd day of May, A. D. 1885, the same being one of the regular juridicial days of the May term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court, and in said cause, to wit:

Order: Cause continued.

24 THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } 1663. Money demand.

At this day comes H. W. Hobson, esq., district attorney, who prosecuted the pleas of the United States in this behalf, and on his motion it is ordered by the court that this cause stand continued.

And afterwards, and on, to wit, the 13th day of November, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Leave to amend complaint and rule to answer.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } 1663. Money demand.

At this day comes the said plaintiff, by H. W. Hobson, esq., its attorney, and the said defendant, J. L. Sanderson, by J. Q. Richmond, esq, his attorney, also comes.

And thereupon, on motion of the said plaintiff, the said defend-
25 ant, J. L. Sanderson, now here in open court consenting thereto, it is ordered by the court that the said plaintiff may amend its complaint herein forthwith, as it shall be advised.

It is further ordered by the court that the said defendant, J. L. Sanderson, answer the said amended complaint by or before the first day of December proximo, as he shall be advised.

And afterwards, and on, to wit, the 14th day of November, A. D. 1885, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its amended complaint.

And the said amended complaint is in words and figures as follows, to wit:

Amended complaint.

In the United States circuit court for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BRADLEY BARLOW AND J. L. SANDERSON, defendants.
} Amended complaint.

The United States of America, plaintiff, complains of the defendants, Bradley Barlow and J. L. Sanderson, and for a cause of action says:

26 I. That the said defendants on the 14th day of August, 1882, were indebted to the plaintiff in the sum of ninety-nine thousand five hundred and eighty dollars and twenty-one cents ($99,580.21) for so much money by the said defendants before that time had and received to and for the use of the said plaintiff, which said sum of money the plaintiff avers was then and there due and payable, yet the said defendants, although often requested so to do, have never paid said sum of money nor any part thereof, wherefore the plaintiff prays judgment against said defendants for the sum of ninety-nine thousand five hundred and eighty dollars and twenty-one cents ($99,580.21), with interest thereon at the rate of six per centum per annum from the 14th day of August, 1882, together with the costs of this suit.

II. And for a further cause of action this plaintiff says that from the first day of October, 1878, up to and including the 30th day of June, 1882, the defendants, Bradley Barlow and J. L. Sanderson, were subcontractors for carrying the United States mail upon the mail route then known and designated as route No. 38146, running from Garland to Ouray, in the State of Colorado, and were duly recognized as such subcontractors by the Postmaster-General; that on the first day of October, 1878, an order was made by the Postmaster-General affecting said route as follows:

"OCTOBER 1ST, 1878.

"(8600) 1st. Omit service from Mineral Point to Ouray, 10 miles; reduce service four trips per week from Lake City to Mineral Point, 36 miles; change service so as to embrace Barnum, between Lake City and Ouray, increasing distance 110 miles, and allow contractor $7,699.65
27 per annum additional pay, being pro rata from October 1st, 1878; allow contractor one month's extra pay on service dispensed with. 2nd. Reduce schedule time from 72 hours to 36 hours from Lake City to Barnum, 110 miles, and allow contractor $15,994.77 per ann. additional pay, being pro rata from October 1st, 1878."

That on January 22d, 1879, an amendment to said order was made by the Postmaster-General as follows:

"JAN. 22, 1879.

"(673) Amend order of October 1st, 1878 (8600), so as to pay subcontractor in like amount."

That on January 23d, 1879, a further order was made by the Postmaster-General as follows:

"JAN. 23, 1879.

"(710) 1st. Modify order of Oct. 1, 1878 (8600), so as to omit service from Mineral Park to Ouray, 10 miles, and deduct from contractor's pay $969.39 per annum, being pro rata, and allow contractor one month's extra pay on service dispensed with.

2nd. Reduce service four trips per week on 36 miles, decreasing contractor's pay $1,994.16 per ann., being pro rata, and allow one month's extra pay on service dispensed with.

3rd. Allow contractor $10,663.26 per ann. additional pay, being pro rata for 110 miles increase in distance."

That so much of the said order of October 1st, 1878, as authorized an additional allowance to the contractor of $15,994.77 per annum for expedition of service upon that portion of the route therein described, "From Lake City to Barnum, 110 miles" (which description is manifestly erroneous, and was intended to read, "From Lake City to Ouray via Barnum, 110 miles," but by a clerical error was written as above), was made
28 solely upon the basis of a certain statement made and sworn to on the 30th day of September, 1878, by one of the said defendants, J. L. Sanderson, which said statement was presented to the Postmaster-General by or on behalf of the said defendants, and a copy whereof is hereto annexed, marked Exhibit A, and made a part hereof. And the said additional allowance made as aforesaid was thereafter from time to time paid to the said defendants Bradley Barlow and J. L. Sanderson.

The plaintiff further says that the allegations in the said sworn statement presented to the Postmaster-General as aforesaid, and upon the basis of which the said additional allowance was ordered, and payments made as aforesaid, were false and untrue, as the defendants then and there well knew, in this, that it was therein alleged that to perform the service upon said route between Lake City and Ouray, on the schedule of 72 hours then existing, required twenty-two horses and eleven men, and that to perform the same service on a schedule of 36 hours would require sixty-six horses and twenty-two men, whereas in truth and in fact no additional men or horses were required, nor were any additional men or horses actually employed in performing said service by reason of the expedition of the schedule as aforesaid between Lake City and Ouray. And the said false allegations were designed to mislead and did mislead the Postmaster-General.

And the plaintiff further says that by reason of the false allegations in the statement aforesaid the plaintiff's officers were induced to pay and did pay the moneys aforesaid from time to time, between the 1st day of October, 1878, and the 14th day of August, 1882, amounting in the aggregate to the sum of $59,592.98, which sum was paid by the plaintiff's
29 officers to the defendants in mistake of fact, and was received by the defendants contrary to the provisions of section 3961 of the Revised Statutes of the United States. Said payments are more fully and at length set out in the statement hereto annexed, marked Exhibit B, and made a part hereof. Said Exhibit B also shows the amount which the defendants would have been lawfully entitled to receive upon the basis of the contract price, and of the stock and carriers actually employed had the

additional service of 110 miles named in the said order of October 1st, 1878, and January 23rd, 1879, been actually performed. But the plaintiff further says that so much of the said order of January 23d, 1879, as authorized an additional allowance to the said defendants of ten thousand six hundred and sixty-three dollars and twenty-six cents ($10,663.26) per annum for said additional service of 110 miles was made by the Postmaster-General upon the understanding and belief that said additional service as named in said order was required and would be performed, and all payments made under and by virtue of said part of the said order were made by plaintiff's officers to the defendants upon the understanding and belief, that said additional service as therein named had been performed, whereas in truth and in fact said additional service was not performed. And the plaintiff further alleges that the amount so paid to and received by the said defendants was thirty-nine thousand nine hundred and eighty-seven dollars and twenty-three cents ($39,987.23).

III. And for a further cause of action this plaintiff says that from the 1st day of October, 1878, up to and including the 30th day of June, 1882, the defendants, Bradley Barlow and J. L. Sanderson, were subcon-
30 tractors for carrying the United States mail upon the mail route then known and designated as route No. 38146, running from Garland to Ouray, in the State of Colorado, and were duly recognized as such subcontractors by the Postmaster-General. That on the 1st day of October, 1878, an order was made by the Postmaster-General affecting said route, as follows:

"OCTOBER 1ST, 1878.

"(8600) 1st. Omit service from Mineral Point to Ouray, 10 miles; reduce service four trips per week from Lake City to Mineral Point, 36 miles; change service so as to embrace Barnum between Lake City and Ouray, increasing distance 110 miles, and allow contractor $7,699.65 per annum additional pay, being pro rata from October 1st, 1878; allow contractor one month's extra pay on service dispensed with.

"2nd. Reduce schedule time from 72 hours to 36 hours from Lake City to Barnum, 110 miles, and allow contractor $15,994.77 per ann. additional pay, being pro rata from October 1st, 1878."

That the second clause of the foregoing order contains a manifest and admitted clerical error, and was intended to be written and has always been treated by the Postmaster-General and by the defendants as though the same had been written as follows:

"2nd. Reduce schedule time from 72 hours to 36 hours from Lake City to Ouray by way of Barnum 110 miles, and allow contractor $15,994.77 per ann. additional pay, being pro rata from October 1st, 1878."

That on January 22d, 1879, an amendment to said order was made by the Postmaster-General as follows:

"JAN. 22, 1879.

31 "(673) Amend order of October 1st, 1878 (8600), so as to pay subcontractor in like amount."

That on January 23d, 1879, a further order was made by the Postmaster-General as follows:

"JAN. 23, 1879.

"(710) 1st. Modify order of Oct. 1, 1878 (8600), so as to omit service from Mineral Park to Ouray, 10 miles, and deduct from contractor's pay $969.39 per annum, being pro rata, and allow contractor one month's extra pay on service dispensed with."

"2nd. Reduce service four trips per week on 36 miles, decreasing contractor's pay $1,994.16 per ann., being pro rata, and allow one month's extra pay on service dispensed with."

"3rd. Allow contractor $10,663.26 per ann. additional pay, being pro rata for 110 miles increase in distance."

Plaintiff further alleges that the whole length of the said route from Garland to Ouray as originally described and let was 196 miles; that the distance from Garland to Lake City was 150 miles, and the distance from Lake City by way of Mineral Point to Ouray was 46 miles; that the total running time between the terminal points of said route was fixed at fifty-seven hours, and the total compensation at nineteen thousand dollars per annum, as will more fully appear by an inspection of the original contract, a copy of which is hereto annexed, marked Exhibit C, and made a part hereof.

Plaintiff further shows that the compensation provided by the contract aforesaid, for the service aforesaid, was at the rate of $96.39 per mile per annum for carrying the mail at an average speed of 3.44 miles per hour over the whole route as originally contracted for, and that for the additional service aforesaid of 110 miles the defendants were entitled
32 to receive and could lawfully receive compensation not exceeding the said rate, $96.39 per mile per annum for each additional mile of service performed at a speed not exceeding the average speed named in the original contract to wit, 3.44 miles per hour; that the part of the said route, from Lake City to Ouray by the way of Mineral Point (viz, from Mineral Point to Ouray, a distance of ten miles), lies over a precipitous mountain trail, passable only by pack animals, and for this reason the running time upon this fraction of the route was placed at 30 hours, or at the rate of 1.53 miles per hour, whereas the running time upon that portion of the route lying between Garland and Lake City was fixed at the rate of 5.55 miles per hour; that the additional service added of 110 miles between Lake City and Ouray by way of Barnum was upon a good and practicable road over which the defendants ran stages and other vehicles and transported freight and passengers, which is and was as well adapted to the average rate of speed fixed by the original contract as the road from Garland to Lake City was adapted to the rate of speed fixed for that portion of the line.

Plaintiff avers that the said additional service from Lake City to Ouray, by way of Barnum, was never performed, nor was it ever required to be performed, at the speed equal to the average speed fixed by said contract. Plaintiff therefore further avers that the allowance of fifteen thousand nine hundred and ninety-four dollars and seventy-seven cents ($15,994.77) (over and above the pro rata allowance of ten thousand six hundred and sixty-three dollars and twenty-six cents) ($10,663.26) was in excess of the exact

proportion which the original compensation under said contract bore to the original service, and that the whole sum so paid was paid to
33 and received by the defendants in violation of the provisions of section 3960 of the Revised Statutes of the United States, and that the plaintiff is entitled to reclaim the whole of the said sum, amounting to fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents ($59,592.98).

Wherefore the plaintiff prays judgment for the sum of ninety-nine thousand five hundred and eighty dollars and twenty-one cents ($99,580.21), with interest thereon at the rate of six per centum per annum from the 14th day of August, 1882, together with the costs of this suit.

That the defendants are residents of the State and district of Colorado, and within the jurisdiction of this court.

(S'g'd) HENRY W. HOBSON,
U. S. District Attorney, District of Colorado.

(S'g'd) GEO. L. DOUGLASS,
Of Counsel and Special Assistant.

EXHIBIT A.

J. H. C.

POST-OFFICE DEPARTMENT,
Washington, D. C., August 2nd, 1883.

I, A. D. Hazen, Acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original affidavit on file in this Department.

In testimony whereof, I have hereto set my hand and caused the seal of the Post-Office Department to be affixed at the city of Washington, the day and year above writen.

[SEAL.] (Signed) A. D. HAZEN,
Acting Postmaster-General,

34 EXHIBIT A.

WASHINGTON, *Sept.* 30, 1878.

Hon. THOS. J. BRADY,
Second Asst. Postmaster-General:

SIR: To perform the service on route No. 83146 between Lake City and Ouray on the present schedule of seventy-two hours requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require (66) sixty-six horses and twenty-two men.

(Signed) J. L. SANDERSON.

Subscribed and sworn to before me this 30th day of September, 1878.

(Signed) J. H. HERRON,
Notary Public.

(Endorsed:) Copy. 1878, Sept. 30. 38146. Colo. Affidavit of J. L. Sanderson as to cost of expedition of schedule.

EXHIBIT B,

DEC. 10, 1884.

Route No. 38146. Garland to Ouray, Colorado. Contract term July 1, 1878, to June 30, 1882.

Contractor, Luke Voorhees.
Subcontractors (from Oct. 1, 1878.)
Bradley Barlow and J. L. Sanderson.
Service expedited from Oct. 1, 1878.

Cost of service was as follows:

35	From July 1, 1878, to Sep. 30, 1878, at	$19,000 00	p. a.	$4,750 00
	" Oct. 1, 1878, " Jan. 31, 1880, "	42,594 48	"	57,004 17
From	Feb'y 1, 1880, to Aug. 31, 1881, "	39,689 38	"	62,840 71
"	Sep. 1, 1881, " June 30, 1882, "	36,296 53	"	30,181 36
	Additional allowance on service dispensed with, viz:			
By order of	Jan'y 23, 1879, 1 mo's pay, at	$969 39	p. a.	80 78
"	" " " " " " " "	1,994 16	"	166 18
"	" " May 4, 1880, " " " "	3,005 10	"	250 42
"	" " Aug. 24, 1881, " " " "	3,392 85	"	282 74
Total allowance for service				$155,556 36
The auditor made this amount greater by				07
				$155,556 36

Deductions were as follows:

Quarter ended Dec. 31, 1879	$195 06	
" " Mar. 31, 1880	527 71	
" " June 30, 1880	861 25	
" " June 30, 1881	14 91	
" " Mar. 31, 1882	4 78	
" " June 30, 1882 (fine)	20 00	
Total deduction	$1,623 71	
Total deduction bro't for'd		$1,623 71

Remission was as follows:

Quarter ended June 30, 1880	424 00
Total deductions not remitted	$1,199 71

Recapitulation:

Total allowance for service	$155,556 43
Total deductions not remitted	1,199 71
Amount actually paid for service	$154,356 72

36 Pay on the basis of stock and carriers actually employed would have been as follows:

From	July 1, 1878, to Sep. 30, 1878, at	$19,000 00	p. a.	$4,750 00
"	Oct. 1, 1878, " Jan'y 31, 1880, "	26,699 71	"	35,648 52
"	Feb'y 1, 1880, " Aug. 31, 1881, "	23,694 61	"	37,515 98
"	Sep. 1, 1881, " June 30, 1882, "	20,301 76	"	16,881 35

Additional allowance on service dispensed with viz:					
By order of Jan'y 23, 1879, 1 mo's pay at	969 39	p. a.			$80 78
" " " " " " " " " "	1,994 16	"			166 18
" " " May 4, 1880 " " " "	3,005 10	"			250 42
" " " Aug. 24, 1881 " " " "	3,392 85	"			282 74
Total allowance for service on new basis					$95,575 97
Deductions on new basis would have been as follows:					
Quarter ended Dec. 31, 1879				$159 17	
" " Mar. 31, 1880				284 82	
" " June 30, 1880				338 70	
" " June 30, 1881				4 77	
" " Mar. 31, 1882				4 77	
" " June 30, 1882 (fine)				20 00	
Total deduction on new basis					812 23
(No Remission)					
Amount which should have been paid for service					$94,763 74
Final recapitulation:					
Amount actually paid for service					$154,356 72
Amount which should have been paid					94,763 74
Amount to be recouped					59,592 98

37 EXHIBIT C, WITH COMPLAINT.

POST-OFFICE DEPARTMENT,
Washington, D. C., Dec. 9th, 1884.

I certify that the annexed is a true copy taken from the files and records of this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Post-Office Department to be affixed the day and year above written.

[SEAL.] (S'g'd) JNO. SCHUYLER CROSBY,
Acting Postmaster-General.

UNITED STATES OF AMERICA,
Cheyenne, Laramie Co., Wyo.

No. 38146. $19,000 per annum.

This article of contract, made March 15th, eighteen hundred and seventy-eight, between the United States of America (acting in this behalf by their Postmaster-General), and Luke Voorhees and O. J. Salisbury, of Salt Lake City, U. T., and J. T. Gilmer, of Salt Lake City, U. T., as his sureties, witnesseth, that whereas Luke Voorhees has been accepted, according to law, as contractor for transporting the mail on route No. 38146, from Garland, Col., by Fort Garland, Wayside, Del Norte, South Fork, Wagon Wheel Gap, Antelope Springs, Lake City, Sherman, Burrow's Park, Tellurium, and Animas Forks, to Ouray and back, seven times a week, at

nineteen thousand dollars per year, for and during the term beginning July first, eighteen hundred and seventy-eight, and ending June thirtieth,
38 eighteen hundred and eighty-two: Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract, and within the time fixed in the annexed schedule of departures and arrivals; and so to carry until said schedule is altered by the authority of the Postmaster-General of the United States, as hereinafter provided, and then to carry according to such altered schedule; and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion, if its weight, bulk, or safety shall so require; and that they will carry the mail, upon demand, by any conveyance which said contractor regularly runs, or is concerned in running, on the route, beyond the number of trips above specified, in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, free from wet or other injury, under a sufficient oil-cloth or bear-skin if carried on a horse, and in a boot under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post-office on the route, or that may hereafter be established on the route (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), and into the post-office at each end of the route, and into the post-
39 office, if one is there kept, at the place at which the carrier stops for the night, and if no post-office is there kept, to lock it up in some secure place, at the risk of the contractor.

They also undertake, covenant, and agree with the United States of America, and do bind themselves, jointly and severally, as aforesaid, to be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein, and those imposed by law, not to commit the care or transportation of the mail to any person under sixteen years of age; to discharge any carrier of said mail whenever required so to do by the Postmaster-General; not to transmit, by themselves, or either of them, or either of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers, which should go by mail; to carry post-office blanks, mail locks, and bags, and other postal supplies, and also the special agents of the Department, on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charges; to collect quarterly, if required by the Postmaster-General, of postmasters on the route the balances due from them to the United States on their quarterly returns, and faithfully to render an account thereof to the Postmaster-General in the settlement of the quarterly accounts of said contractor, and to pay over to the Auditor of the

Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in his hands.

40 For which services, when performed, the said Luke Voorhees, contractor, is to be paid by the United States the sum of nineteen thousand dollars a year, to wit, quarterly, in the months of November, February, May, and August, through the postmasters on the route, or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a pro rata increase of the compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the service retained: Provided, however, That, in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid, that they shall forfeit—

1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

2. At least one-fourth of the pay of the trip when the running is so far behind time as to fail to make connection with a depending mail.

41 3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail, or giving preference to passengers or freight over the mail or any portion thereof, or for leaving the same for their accommodation, or carrying, otherwise than in the mail, matter which should go by mail, or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster-General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster-General, according to the nature or frequency of the failure and the importance of the mail: Provided, That except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster-General may annul the contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier when required by the Department; for transmitting commercial intelligence or matter, which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of

Congress; and whenever, in the opinion of the Postmaster-General, the service cannot be safely continued, the revenues collected, or the
42 laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed that such annulment shall not impair the right to claim damages from said contract, and his sureties under this contract; but such damages may, for the purpose of set-off or counter-claim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Posmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster-General.

And this contract shall, in all its parts, be subject to the terms and requirements of the act of Congress approved April twenty-first, one thousand eight hundred and eight, entitled, "An act concerning public contracts," and of the act of Congress approved June eight, one thousand eight hundred and seventy-two, entitled, "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature; and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

(S'g'd) D. M. KEY,
Postmaster-General.

43 Signed, sealed, and delivered by the Postmaster-General in the presence of—
(S'g'd) J. N. DORRIS.

And by the other parties hereto in the presence of—
(S'g'd) H. A. IDDINGS,
(S'g'd) M. WILLSIE,
Witnesses.

Signed, this 29' day of March, 1878.
(S'g'd) LUKE VOORHEES, [SEAL.]

Signed, this 29th day of March, 1878.
(S'g'd) O. J. SALISBURY, [SEAL.]
Contractor.

Signed, this 15th day of Ap'l, 1878.
(S'g'd) JOHN T. GILMER, [SEAL.]
Sureties.

POST-OFFICE, CHEYENNE, WYO.,
April 18, 1878.

I hereby certify that John T. Gilmer and O. J. Salisbury, of Salt Lake

City, Utah, are good and sufficient sureties for the amount of the foregoing contract.

(S'g'd) H. GLAFCKES,
Postmaster.

The schedule of departures and arrivals.

Leave Garland daily at 8 p. m.; arrive at Lake City in 27 hours.
Leave Lake City daily at 1 p. m.; arrive at Garland in 27 hours.
Leave Lake City daily at 1 a. m.; arrive at Ouray daily in 30 hours.
Leave Ouray daily at 7 a. m.; arrive at Lake City in 30 hours.

Arrivals and departures at Garland to be made in close con-
44 nection with the Denver & Rio Grande Railroad.

Provided, that when more than seven minutes are taken for opening and closing the mails at any office the surplus time so taken is to be allowed in addition to the time fixed in this schedule.

Certificate of the oath of mail contractors and carriers required by act of Congress of June 8, 1872.

I, Luke Voorhees, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 38146, from Garland to Ouray, of Colorado, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post roads within the United States, and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control. And I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign or domestic. So help me God.

(S'g'd) LUKE VOORHEES,
Contractor.

COUNTY OF LARAMIE,
Terr'y of Wyoming, ss:

Sworn before the subscriber, a notary public for the county and Territory aforesaid, this first day of April, A. D. 1878; and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

45 (S'g'd) E. W. MANN.

(Endorsed:) No. 1663. The United States vs. Barton & Sanderson. Circ. court United States. Amended complaint. Filed Nov. 14, 1885. (S'g'd) Edward F. Bishop, clerk; Henry W. Hobson, U. S. Att'y.

And afterwards and on, to wit, the 14th day of November, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, present, the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Leave to withdraw exhibits.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW ET AL. } 1663. Money demand.

At this day comes the said plaintiff by H. W. Hobson, esq., district attorney, and thereupon, on motion of the said district attorney, it is ordered by the court that he have leave to withdraw permanently from the files herein the exhibits attached to the complaint herein, to wit, Exhibits A and B, upon leaving his receipt therefor with the clerk.

46 And afterwards and on to wit, the 18th day of November, A. D. 1885, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its præcipe for and sued out of and under the seal of said court, an alias writ of attachment.

And the said alias writ of attachment, with the marshal's return thereon, is in words and figures as follows, to wit:

Alias writ of attachment.

In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
versus
BRADLEY BARLOW AND J. L. SANDERSON, defendant. } Writ of attachment.

The President of the United States of America to the marshal of the district of Colorado, greeting.

Whereas the above-entitled action was commenced in the circuit court of the United States for the district of Colorado by the plaintiff in said action to recover from the defendants, Bradley Barlow and J. L. Sanderson, in the said action, the sum of fifty-nine thousand five hundred
47 and ninety-two dollars and ninety-eight cents ($59,592.98), lawful money of the United States, besides interest at the rate of six per cent. per annum from the 14th day of August, A. D. 1882, and costs of suit, and the necessary affidavit and undertaking herein having been filed as required by law:

Now, therefore, you are hereby commanded, as you have heretofore been commanded, that you serve a copy of this writ on each of the said defendants, and that you attach and safely keep the lands, tenements, goods, chattels, rights, credits, moneys, and effects of the said defendants, Bradley Barlow and J. L. Sanderson, of every kind within your said district, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned, unless the said defendant deposit with you the amount or give you security, by an undertaking of at least two sufficient sureities in an amount sufficient to sat-

isfy such demand, besides costs, or in amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking. Hereof make due and legal service and return.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme court of the United States, and the seal of the said circuit court at the city of Denver, in said district, this 18th day of Nov'r, A. D. 1885, and of the Independence of the United States the 110th year.

{ SEAL U. S. } (S'g'd) EDWARD F. BISHOP,
{ CIR. C'T. } *Clerk,*

By F. W. TUPPER,
Deputy Clerk.

48 *Marshal's return.—Received November* 19, 1885, 10 *o'clock.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

I have duly executed the within writ by personally delivering a true copy hereof, together with a true copy of the garnishee summons, as per Exhibit A, hereto attached, to H. S. Porteous at Denver, Arapahoe County, Colorado, November 20th, A. D. 1885. This writ, therefore, returned without further service by order of H. W. Hobson, esq., U. S. attorney, December 30th, 1885.

(S'g'd) WALTER A. SMITH,
Marshal,

By SIM,
Deputy Marshal.

EXHIBIT A.

Garnishee summons.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the circuit court of the United States for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANTS.

49 The President of the United States of America to H. S. Porteous, greeting:

You are hereby notified that you are attached as garnishee in the above-entitled cause, and you are required not to pay any debts due or to become due from yourself to the said defendants, or either of them, and that you must retain possession of all property, effects, and choses in action now in your possession or under your control, and belonging to the said defendants, or either of them, in order that the same may be dealt with according to law.

And you are hereby commanded to be and appear at said court and answer or plead to this summons within ten days (exclusive of the day of

service) after this summons shall be served upon you if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service, to answer what may be objected against you in that behalf, and if you fail so to do the said plaintiff will take judgment against you by default.

(S'g'd) WALTER A. SMITH,
U. S. Marshal,
By SIM. W. CANTRIL,
Deputy Marshal.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
50 BRADLEY BARLOW AND J. L SANDERSON, defendants.

To H. S. PORTEOUS:

1. Are you in any manner indebted to the defendants, or either of them, either property or money, and is the same now due; if not, when is the same to become due? State fully all particulars.

Answer. I am not in any manner indebted to the defendants or either of them.

2. Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendants or either of them, or in which they are interested? If so, state what is the value of the same, and state fully all the particulars.

Answer. I have not.

3. Do you know any debts owing to the said defendants or either of them, whether due or not due, or any property, effects, goods, chattels, rights, credits, or choses in action belonging to them or in which they interested, and now in the possession or under the control of others? If so, state the particulars.

Answer. I know nothing of the kind.

(S'g'd) H. S. PORTEOUS,
Garnishee.

I, H. S. Porteous, do solemnly swear or affirm that the answer to the foregoing interrogatories by me subscribed are true. So help me God.

(S'g'd) H. S. PORTEOUS,
Garnishee.

Subscribed and sworn to before me this 30th day of November, A. D. 1885.

(S'g'd) WALTER A. SMITH,
U. S. Marshal,
51 By SIM. W. CANTRIL,
Deputy Marshal.

(Endorsed:) Gen., No. 1663. Garnishee Summons, United States circuit court. The United States vs. Bradley Barlow et al. District of Colorado, ss. Served by reading to and leaving a copy with the within-named

H. S. Porteous, at Denver, Colorado, Nov. 20th, 1885, together with copy of attachment and taking answers as above, this 30th day of November, 1885, at Denver, Colo.

(S'g'd) WALTER A. SMITH,
United States Marshal,
By SIM. W. CANTRIL,
Deputy Marshal.

(Endorsed:) Gen., No. 1663. Circuit court of the United States, eighth circuit, district of Colorado. The United States, plaintiff, versus Bradley Barlow et al., defendant. Alias writ of attachment. Filed this 30' day of Dec., A. D. 1885.

(S'g'd) EDWARD F. BISHOP,
Clerk,
By F. W. TUPPER,
Deputy Clerk.
H. W. HOBSON,
Of Denver, Attorney for Plaintiff.

And afterwards and on, to wit, the 2nd day of December, A. D. 1885, came the said defendants by Messrs. Pitkin and Richmond, and L. S. Dixon, their attorneys, and filed in said court and in said cause their answer to the amended complaint.

And the said answer is in words and figures as follows, to wit:

52 *Answer to amended complaint.*

In the United States circuit court for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BRADLEY BARLOW AND J. L. SANDERSON, DEFENDANTS.

The answer of the defendants above named to the amended complaint of the plaintiff.

First. For answer to the first cause of action the defendants say:

That they were not, nor was either of them, on the 14th day of August, 1882, or at any other time, nor are they, or either of them, now indebted to the plaintiff in the sum of ninety-nine thousand five hundred and eighty dollars and twenty-one cents, or in any other sum, or for so much or any money by the said defendants, or either of them, before that time had or received to or for the use of the said plaintiff or otherwise; nor was the said sum of money, or any part thereof, then or there or at any other time due or payable to the plaintiff; nor are the defendants, or either of them, indebted to the plaintiff in said sum of money or any part thereof.

Second. For answer to the second cause of action the defendants say:

53 That from the first day of October, 1878, up to and including the 30th day of June, 1882, the defendants were subcontractors for carrying the United States mail upon the mail route then known and designated as route No. 38146, running from Garland to Ouray, in the State of Colorado, and were duly recognized as such subcontractors by the Postmaster-General.

That as to whether or not on the 1st day of October, 1878, an order was made by the Postmaster-General affecting said route in words and figures as is alleged and set forth in the second cause of action in said complaint, these defendants, nor either them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

That as to whether or not on the 22nd day of January, 1879, an amended order was made by the Postmaster-General in the words and figures as is alleged and set forth in the said second cause of action in said complaint, these defendants, nor either of them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

And that as to whether or not on the 23rd day of January, 1879, a further order was made by the Postmaster-General in the words and figures as is alleged and set forth in the said second cause of action in said complaint, these defendants, nor either of them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

These defendants admit that at the times stated in said second
54 cause of action certain orders were made by the Postmaster-General concerning said mail route No. 38146, by which the distance between Lake City and Ouray, upon said route, was increased 110 miles, and the said route so changed as to embrace Barnum, between Lake City and Ouray, and also concerning the expedition of mail service on said route between said Lake City and Ouray, over the line or route as thus increased, substantially as in the said order of October 1st, 1878, set forth; but they deny that said order of October 1st, 1878, was made solely upon the basis of a certain statement made and sworn to on the 30th day of September, 1878, by the said defendant J. L. Sanderson, and presented to the Postmaster-General, and deny that said additional allowance therein made was thereafter, from time to time, paid to these defendants as in said second cause of action is alleged.

Defendants admit that on the 30th day of September, 1878, the defendant, J. L. Sanderson, made the certain statement, duly verified under oath, referred to in plaintiff's said second cause of action, a copy of which is annexed to said amended complaint and marked Exhibit A, but deny that the allegations in said sworn statement so presented to the Postmaster-General were, or was any or either of them, false or untrue in the particulars or respects as in the said second cause of action is alleged, to the knowledge of these defendants or either of them.

These defendants say that the schedule of 72 hours mentioned in said sworn statement was the true schedule of time, to-wit, about one and a half miles per hour for the transportation of the mail over the said increased distance of 110 miles between Lake City and Ouray, as specified and provided for in the original contract for such service; and they
55 further say with respect to the allegation in such statement, that it required 22 horses and 11 men at that time to perform the service on the schedule of 72 hours, and that to perform the same on a schedule of 36 hours over said increased distance of 110 miles would require 66 horses and 22 men; that such allegation was a mere estimate at that time made by the said defendant Sanderson at the request of the Post-

master-General of the number of men and horses which would be required to perform such service upon the schedule of 72 hours and 36 hours as therein stated over such increased distance, and not an allegation of any then existing facts in relation to the number of men and horses at that time actually employed and in use in the transportation of the mails over such changed and increased route, which changed and increased route did not then in fact exist.

That at the time said sworn statement was made the order increasing the distance between Lake City and Ouary, via Barnum, as in said second cause of action set forth, had not been made, but the same was contemplated by the Postmaster-General; and that it was in view of such contemplated change over a new and entirely untried and increased route that the said defendant Sanderson was requested to make an estimate of the number of men and horses which would be required to transport the mail over the same by the old or contract schedule of 72 hours, and by the increased expedition to 36 hours in case such expedition should be ordered; that at the time of the making of said sworn statement the facts aforesaid, and the purposes for which such statement was made, were well known to the Postmaster-General and his subordinates and assistants.

And these defendants say that such estimate and the allegations in
56 said sworn statement contained were fairly, honestly, and truthfully made and were not in any manner false or intended to deceive the Postmaster-General, or any of the subordinate officers acting under him; and that, in truth and in fact, the employment of additional men and horses were thereby made necessary and required to perform such service over said increased distance of 110 miles on the schedule of 36 hours, in more than three times the number previously and then necessarily employed in performing, and which would have been required to have performed the same service upon the schedule of 72 hours and at the rate of speed specified in and required by the original contract for carrying the mails between said Lake City and Ouray.

And defendants further deny that no additional men or horses were required, and that additional men and horses were not actually used in performing said service by reason of the expedition of the schedule between Lake City and Ouray, and deny that said allegations, or any of them, were false, or were designed to mislead, or did mislead, the Postmaster-General as in said second cause of action alleged.

Defendants deny that by reason of the so-called false allegations in the said statement, or any false allegations whatsoever, made by or on behalf of these defendants, or either of them, the plaintiff"s officers were induced to pay, or did pay, moneys from time to time between the first day of of October, 1878, and the 14th day of August, 1882, amounting in the aggregate to the sum of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents, or any other sum, or that said sum, or any sum, was paid by the plaintiff"s officers to the defendants, or either of them, in mistake of fact, or was received by these defendants, contrary to the provisions of section 3961 of the Revised Statutes of the
57 United States, or of any other statute or law respecting such payments; and defendants deny that payments were made to them as set out in the statement annexed to said amended complaint marked Exhibit B and made a part thereof, or that said Exhibit B shows the

amount which the defendants would have been lawfully entitled to receive upon the basis of the contract price and of the stock and carriers actually employed had the additional service of 110 miles named in said orders of October 1st, 1878, and January 23rd, 1879, been actually performed as in the said second cause of action is alleged.

And defendants admit that so much of said order of January 23rd, 1879, as authorized an additional allowance to the defendants of ten thousand six hundred and twenty-six dollars per annum for said additional service of 110 miles, was made by the Postmaster-General upon the understanding and belief that said additional service, as named in said order, was required and would be performed, and that all payments made under and by virtue of said part of the said order were made by the plaintiff's officers to these defendants upon the understanding and belief that said additional services therein named had been performed; but deny that in truth or in fact said additional service was not performed, and deny that the sum of thirty-nine thousand nine hundred and eighty-seven dollars and twenty-three cents, or any other sum, was paid by the plaintiff to these defendants, or either of them, for additional service not in fact performed by said defendants.

Third. And for answer to the third cause of action defendants admit—

That from the 1st day of October, 1878, up to and including the 30th day of June, 1882, they were subcontractors for carrying
58 the United States mail, upon the mail route then known and designated as route No. 38146, running from Garland to Ouray, in the State of Colorado, and were only recognized as such subcontractors by the Postmaster-General.

That as to whether or not, on the 1st day of October, 1878, an order was made by the Postmaster-General affecting said route, in words and figures as is alleged and set forth in the third cause of action in said complaint, these defendants, nor either of them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

That as to whether or not on the 22nd day of January, 1879, an amended order was made by the Postmaster-General, in the words and figures as is alleged and set forth in the said third cause of action in said complaint, these defendants, nor either of them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

And that as to whether or not on the 23rd day of January, 1879, a further order was made by the Postmaster-General, in the words and figures as is alleged and set forth in the said third cause of action in said complaint, these defendants, nor either of them, have not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore deny the same and insist upon strict proof thereof.

Defendants admit that the whole length of said route from Garland to Ouray, as originally described and let, was one hundred and ninety-six miles; that the distance from Garland to Lake City was one hun-
59 dred and fifty miles, the distance from Lake City, by way of Mineral Point, to Ouray was forty-six miles; that the total running time between the terminal points of said route was fixed at fifty-seven hours, and the total compensation at nineteen thousand dollars per

annum, as in said third cause of action alleged. But defendants say, as appears by said original contract, a copy of which, marked Exhibit C, is annexed to said amended complaint and made a part thereof, that the said time was divided as follows: From Garland to Lake City, one hundred and fifty miles, twenty-seven hours, and from Lake City to Ouray, forty-six miles, thirty hours.

Defendants further say that the compensation provided by said contract for the service aforesaid was at the rate of ninety-six dollars and ninety-three cents per mile, instead of ninety-six dollars and thirty-nine cents, as alleged in said third cause of action in said amended complaint; but not for an average speed of 3.44 miles per hour over the whole route from Garland to Ouray, but for a specific rate of speed of something more than five and a half miles per hour from Garland to Lake City and 1.53 miles per hour from Lake City to Ouray, and defendants deny that for the additional service aforesaid of 110 miles between Lake City and Ouray they were entitled to receive, or could lawfully receive, compensation not exceeding the said rate of ninety-six dollars and ninety-three cents per mile per annum for each additional mile of service performed at a speed not exceeding 3.44 miles per hour, but aver that they were entitled to receive, and could lawfully receive, compensation at the rate of ninety-six dollars and ninety-three cents per mile per annum for each additional
60 mile of service performed at a speed not exceeding 1.53 miles per hour; and admit that the part of said route from Lake City to Ouray, by way of Mineral Point, viz, from Mineral Point to Ouray, a distance of 10 miles, lies over a precipitous mountain trail, passable only by pack animals, but deny that the additional service of 110 miles added between Lake City and Ouray, by way of Barnum, was upon a good or practicable road, over which the defendants ran or could run stages or other vehicles, or transported or could transport freight or passengers, during the larger part of the time specified in said orders of the Postmaster-General, and during which they were required to transport the mail over such increased distance of 110 miles; and deny that the same was as well adapted to the average rate of speed fixed by the original contract as the road from Garland to Lake City was adapted to the rate of speed fixed for that portion of the line.

And defendants say that it is not true that said additional service from Lake City to Ouray by way of Barnum was never performed, but on the contrary thereof they say that the same was well and faithfully performed according to the terms of the several orders respecting the same made by the Postmaster-General.

And defendants deny that the allowance of fifteen thousand nine hundred and ninety-four dollars and seventy-seven cents, over and above the pro rata allowance of ten thousand six hundred and sixty-three dollars and twenty-six cents was in excess of the exact proportion which the original compensation under said contract bore to the original service, and deny that the whole sum, or any sum so paid by the plaintiff to these defendants, was paid to or received by them in violation of the provisions of section 3960 of the Revised Statutes of the United States, or in
61 violation of any other statute or law, or that the plaintiff is entitled to reclaim the whole or any part of the said sum of fifty-nine thousand five hundred and ninety-two dollars and ninety-eight cents, or

any part thereof, or any sum of money whatsoever, from these defendants or either of them.

Wherefore these defendants pray to be hence dismissed with their costs in this behalf most unreasonably sustained.

(S'g'd) PITKIN & RICHMOND,
L. S. DIXON,
Attorneys for deft's.

(Endorsed:) No. 1663. In the United States court for the district of Colorado. The United States of America v. Bradley Barlow and J. L. Sanderson. Answer to amended complaint. Filed Dec. 2, 1885. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 8th day of December, A. D. 1885, came again the said plaintiff by its attorney aforesaid, and filed in said court and in said cause its replication to the answer to amended complaint.

And the said replication is in words and figures as follows, to wit:

REPLICATION.

In the circuit court of the United States in and for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
62 BRADLEY BARLOW AND J. L. SANDERSON, defendants.

And now comes the United States of America, by its attorneys, and makes reply to the answer of the above-named defendants, filed on the second day of December, 1885, or to so much thereof as it is necessary for reply to be made to, as follows:

First. It is not true, as alleged on page 4 of said answer, that the schedule of 72 hours, in said answer referred to, was the true schedule of time for the transportation of mail over the route of one hundred and ten miles, between Lake City and Ouray, by way of Barnum, but the plaintiff alleges that said schedule of 72 hours was made by the officials of the Government upon fraudulent and incorrect representations made by the defendants, or one of them, as set forth in the amended complaint herein, and which said schedule was made upon the basis of the original schedule over the route from Lake City to Ouray, by way of Mineral Point, and it was never intended by the Government officials that the service from Lake City to Ouray, by way of Barnum, should be at the rate of one and a half miles per hour. And it is not true that the statements made to the officials of the Department, "that upon the basis of twenty-two horses and eleven men being required to perform the service over the route of one one hundred and ten miles upon a schedule of 72 hours, that on a schedule of 36 hours, sixty-six horses and twenty-two men would be required" was a mere estimate made by the defendant Sanderson, at the re-
63 quest of the Postmaster-General, but on the contrary, plaintiff alleges that the estimate was made by the said Sanderson and pre-

sented to the Postmaster-General in fraud of the Government, the said J. L. Sanderson then and there well knowing that said sixty-six horses and twenty-two men would not be required to perform said service, and the said J. L. Sanderson then and there well knowing that there had never been an actual service upon said route upon a schedule of 72 hours, or at the rate of 1.53 miles per hour. And plaintiff alleges that the order made changing the time over the route of one hundred and ten miles from Lake City to Ouray was brought about entirely by the said J. L. Sanderson, and was made by the Postmaster-General upon a mistaken knowledge of facts. It is not true, as stated on page 5 of said answer, that at the time the sworn statement of J. L. Sanderson referred to was made, that the true facts and purposes for which said statement was made were well known to the Postmaster-General and his subordinates and assistants.

Second. It is denied, that as alleged on page 5 of said answer, that the estimate above referred to, and the allegations in the sworn statement of J. L. Sanderson above referred to, were fairly, honestly, and truthfully made, and were not in any manner false, or intended to deceive the Postmaster-General or any of his subordinate officers. And it is not true that there was an increase in the number of men and horses employed to perform the service over the route of one hundred and ten miles on a schedule of 36 hours, nor is it true that any more men or horses were required to perform said service upon a schedule of 36 hours than was claimed to have been required to perform the service upon a schedule of 72 hours.

64 Third. Plaintiff denies that defendants were ever entitled to a compensation of ninety-six dollars and ninety-three cents, or any other sum per mile, except as stated in the amended complaint herein for a service over the route of one hundred and ten miles between Lake City and Ouray, at the rate of 1.53 miles per hour from Lake City to Ouray. And plaintiff alleges that defendants were never entitled to compensation at all for service at the rate of 1.53 miles per hour, except under orders set out in said amended complaint, and brought about by defendants' fraudulent and incorrect statement of facts. And plaintiff alleges that there never was any service over said route from Lake City to Ouray by way of Barnum at the rate of 1.53 miles per hour.

Fourth. Plaintiff admitted that the schedule of time between Lake City and Ouray, by way of Mineral Point, was at the rate of 1.53 miles per hour, yet denies that defendants were ever entitled to receive compensation for the route from Lake City to Oury, by way of Barnum, upon the same basis, to wit, 1.53 miles per hour. And plaintiff denies that the average time for which defendants were entitled to compensation from Garland to Ouray was divided up as is claimed and alleged on page — of said answer, but, on the contrary, plaintiff alleges, as is set forth in the amended complaint herein, that the average speed of time for which defendants were entitled to compensation, under the contract filed as an exhibit with said amended complaint, and under the statutes of the United States, was the average speed for the total time between Garland and Ouray.

And now, having made reply to so much of said answer as required the same, plaintiff prays judgment according to its amended complaint herein.

65 (S'g'd) HENRY W. HOBSON,
U. S. Att'y for Colo.
(S'g') GEO. L. DOUGLASS,
Of Counsel.

(Endorsed:) No. 1663. U. S. circuit court. United States vs. Bradley Barlow & J. L. Sanderson. Replication. Filed Dec. 8, 1885. (S'g'd) E'ward F. Bishop, clerk; H. W. Hobson, U. S. atty.

And afterwards, and on, to wit, the 15th day of December, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Geo. L. Douglass admitted ex gratia.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } 1663. Money demand.

At this day comes H. W. Hobson, esq., district attorney, and presents to the court George L. Douglass, an attorney of record of the supreme court of the judicature of the District of Columbia, and on motion of the said district attorney it is ordered that he be admitted ex gratia to appear herein as attorney in behalf of the said plaintiff.

And afterwards, and on the same day, to wit, the 15th day of December, A. D. 1885, the following further proceeding was had and
66 entered of record in said court and in said cause, to wit:

Order: Jury trial.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } 1663. Money demand.

At this day comes the said plaintiff, by H. W. Hobson, esq., district attorney, and the said defendants, by J. Q. Richmond, esq., their attorney, also come. And thereupon comes a jury, to wit, (1) George W. Barrett, (2) G. W. Chase, (3) Haskell C. Bristol, (4) George W. Baxter, (5) Richard Darling, (6) Morris Philbrook, (7) Joseph Kendrick, (8) Charles F. Lee, (9) George D. Hauser, (10) J. W. Sullivan, (11) E. B. Gregg, (12) Henry Allen, twelve (12) good and lawful men; and they are duly selected and tried, impaneled and sworn, to well and truly try the issues herein joined, and a true verdict render according to the evidence. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the mat-

ters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

67 And afterwards, and on, to wit, the 16th day of December, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Jury trial.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW ET AL. } 1663. Money demand.

At this day come again the said parties, by their attorneys, respectively. And the jurors heretofore duly impaneled and sworn in this cause, being now all here present and in the jury box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards, and on, to wit, the 17th day of December, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of

68 record in said court, and in said cause, to wit:

Order: Jury trial.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW ET AL. } 1663. Money demand.

At this day come again the said parties, by their attorneys, respectively. And the said jurors being now all here present and in the jury box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards, and on, to wit, the 18th day of December, A. D. 1885, the same being one of the regular juri'cal days of the October term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Jury trial.—Finding for defendants.

THE UNITED STATES OF AMERICA
vs.
69 BRADLEY BARLOW ET AL. } 1663. Money demand.

At this day come again the said parties, by their attorneys, respectively. And the said jurors being now all here present and in the jury bob, the trial of the issues herein joined is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff, to consider of their verdict. And afterwards, and on this same day, came again the said jurors, and on their oaths do say they find for the defendants.

And afterwards, and on, to wit, the 8th day of January, A. D. 1886, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its motion for a new trial of the issues herein joined. And the said motion for a new trial is in words and figures as follows, to wit:

Motion for new trial.

In the circuit court of the United States in and for the district of Colorado.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } Motion for a new trial.

Now comes the plaintiff, by Henry W. Hobson, attorney of the
70 United States for the district of Colorado, and moves the court to set aside the verdict rendered in said cause on the 18th day of December, 1885, and for a new trial.

I. Because the verdict was contrary to the evidence and contrary to the law.

II. Because the court erred in admitting testimony offered by defendants, against the objection of the plaintiff, and in the refusal to admit testimony offered by the plaintiffs.

III. Because the court erred in refusing to give the instructions prayed for by the plaintiff and on file in said cause.

IV. Because the court erred in its instructions to the jury.

(S'g'd) HENRY W. HOBSON,
U. S. Att'y for Colo.

(S'g'd) GEO. L. DOUGLASS,
Of Counsel.

(Endorsed:) No. 1663. The United States vs. Barlow & Sanderson. Motion for new trial. Filed Jan. 8, 1886. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on the same day, to wit, the 8th day of January, A. D. 1886, the same being one of the regular juridical days of the Octo-

ber term, A. D. 1885, of said court, present the honorable Moses Hallett, district judge, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for new trial denied.—60 days for bill of exceptions.

71 THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } 1663. Money demand.

At this day comes the said plaintiff, by H. W. Hobson, esq., district attorney, and the motion of the said plaintiff for a new trial of the issues herein joined, coming on now to be heard, is submitted to the court; and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that the said defendants go hence hereof without day.

And day until sixty (60) days from this day is allowed the said plaintiff to file herein its bill of exceptions reserved by it upon the trial of the issues herein joined.

And afterwards, and on, to wit, the 9th day of March, A. D. 1886, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of exceptions.

72 In the United States circuit court for the district of Colorado.

THE UNITED STATES OF AMERICA
vs.
BRADLEY BARLOW AND J. L. SANDERSON. } No. 1663. Oct. term, 1885.

Be it remembered that heretofore, to wit, on the 15th day of December, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1885, of said court, the said cause coming on for trial before the honorable Moses Hallett, judge of said court, and a jury, the plaintiffs to maintain the issues on their part offered, along with other evidence immaterial to the points involved in this proceeding in error, the following:

1. A certified copy of a certain contract, as follows:

UNITED STATES OF AMERICA,
Cheyenne, Laramie Co., Wyo.

No. 38146. $19,000 per annum.

This article of contract, made March fifteenth, eighteen hundred and seventy-eight, between the United States of America (acting in this behalf

by their Postmaster-General) and Luke Voorhees and O. J. Salisbury, of Salt Lake City, U. T., and J. T. Gilmer, of Salt Lake City, U. T., as
73 his sureties: witnesseth, that whereas Luke Voorhees has been accepted, according to law, as contractor for transporting the mail on route No. 38146, from Garland, Col., by Fort Garland, Wayside, Del Norte, South Fork, Wagon Wheel Gap, Antelope Springs, Lake City, Sherman, Burrows Park, Tellurium, and Animas Forks to Ouray and back, seven times a week, at nineteen thousand dollars per year, for and during the term beginning July first, 1878, and ending July 13th, 1882.

Now therefore the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract, and within the time fixed in the annexed schedule of departures and arrivals; and so to carry until said schedule is altered by the authority of the Postmaster-General of the United States, as hereinafter provided, and then to carry according to such altered schedule; and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require. And that they will carry the mail upon demand, by any conveyance which said contractor regularly runs, or is concerned in running, on the route, beyond the number of trips above specified, in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, free from
74 wet or other injury, under a sufficient oil-cloth or bear-skin, if carried on a horse, and in a boot under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post-office on the route, or that may hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended as hereinafter provided), and into the post-office at each end of the route, and into the post-office, if one is there kept, at the place at which the carrier stops for the night; and if no post-office is there kept to lock it up in some secure place, at the risk of the contractor.

They also undertake, covenant, and agree with the United States of America, and do bind themselves, jointly and severally, as aforesaid, to be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein and those imposed by law, not to commit the care or transportation of the mail to any person under sixteen years of age; to discharge any carrier of said mail whenever required so to do by the Postmaster-General; not to transmit, by themselves, or either of them, or either of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which should
75 go by mail; to carry post-office blanks, mail locks and bags, and

other postal supplies, and also the special agents of the Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge; to collect quarterly, if required by the Postmaster-General, of postmasters on the route the balances due from them to the United States on their quarterly returns, and faithfully to render an account thereof to the Postmaster-General in the settlement of the quarterly accounts of said contractor, and to pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in his hands.

For which services, when performed, the said Luke Voorhees, contractor, is to be paid by the United States the sum of nineteen thousand dollars a year, to wit, quarterly, in the months of November, February, May, and August, through the postmasters on the route, or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service in accordance with law, he allowing a pro rata increase of compensation for any additional service thereby rendered, or for increased speed, if the employment of additional stock or carriers is rendered necessary, and in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra
76 pay on the amount of service dispensed with, and a pro rata compensation for the services retained; provided, however, that in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that they shall forfeit—

1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

2. At least one-fourth of the pay of the trip when the running is so far behind time as to fail to make connection with a depending mail.

3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail, or giving preference to passengers or freight over the mail, or any portion thereof, or for leaving the same for their accommodation, or carrying otherwise than in the mail matter which should go by mail, or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency in due time to the Postmaster-General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster-
77 General, according to the nature or frequency of the failure and the importance of the mail; provided that, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster-General may annul the contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier when required by the Department; for transmitting commercial intelligence, or matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or a member of Congress, and whenever, in the opinion of the Postmaster-General, the service cannot be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed that such annullment shall not impair the right to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counter-claim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express term for a period not exceeding six months, until a new contract for the same, or other contractors, shall be made by the Postmaster-General.

78 And this contract shall, in all its parts, be subject to the terms and requirements of the act of Congress approved April twenty-first, one thousand eight hundred and eight, entitled, "An act concerning public contracts," and of the acts of Congress, approved June eighth, one thousand eight hundred and seventy-two, entitled, "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto annexed, and has attested the same by his signature, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

D. M. KEY,
Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in the presence of—

J. N. DORRIS.

And by the other parties hereto signed in the presence of—

H. A. IDDINGS,
M. WILLSIE,
Witnesses.

Signed, this 29th day of March, 1878.

LUKE VOORHEES, [SEAL.]
Contractor.

Signed, this 29th day of March, 1878.

O. J. SALISBURY, [SEAL.]

Signed, this 15th day of Ap'l, 1878.

JOHN T. GILMER, [SEAL.]
Sureties.

POST-OFFICE, CHEYENNE, WYO.,
April 18, 1878.

I hereby certify that John T. Gilmer and O. J. Salisbury, of Salt Lake City, Utah, are good and sufficient sureties for the amount of the foregoing contract.

H. GLAFCKEY,
Postmaster.

78½ *The schedule of departures and arrivals.*

Leave Garland daily at 8 p. m.; arrive at Lake City in 27 hours.
Leave Lake City daily at 1 p. m.; arrive at Garland in 27 hours.
Leave Lake City daily at 1 a. m.; arrive at Ouray in 30 hours.
Leave Ouray daily at 7 a. m.; arrive at Lake City in 30 hours.
Arrivals and departures at Garland to be made in close connection with the Denver and Rio Grande Railroad.

Provided, That when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to the time fixed in this schedule.

Certificate of the oath of mail contractors and carriers required by act of Congress June 8, 1872.

I, Luke Voorhees, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 38146, from Garland to Ouray, of Colorado, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control. And I do further solemnly swear that I will support and defend the Constitution of the United States against all enimies, foreign and domestic. So help me God.

LUKE VOORHEES,
Contractor.

COUNTY OF LARIMIE,
Ter'ry of Wyoming, ss:

Sworn before the subscriber, a notary public for the county and Territory aforesaid, this first day of April, A. D. 1878; and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

E. W. MANN.

79 2. A certified copy of a certain sworn statement of J. L. Sanderson as follows:

WASHINGTON, *Sept.* 30, 1878.

Hon. THOS. J. BRADY,
Second Ass't Postmaster-General:

SIR: To perform the service on route No. 38146, between Lake City and Ouray, on the present schedule of seventy-two hours requires twenty-

two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require 66 sixty-six horses and twenty-two men.

J. L. SANDERSON.

Subscribed and sworn to before me this 30th day of Sept., 1878.

J. H. HERRON,
Notary Public.

3. A certified copy of certain orders made by the Postmaster-General as follows:

EXHIBIT A. 38146.

POST-OFFICE DEPARTMENT,
OFFICE OF THE POSTMASTER-GENERAL,
Washington, D. C., Sept. 24, 1883.

I certify that the annexed is a true copy of the record of route No. 38146, Colorado, as it appears upon the books of this Department.

In testimony whereof I have set my hand and caused the seal
80 of the Post-Office Department to be affixed, the day and year above written.

[SEAL.] (S'g'd) FRANK HATTON,
Act'g Postmaster-General.

SEPT. 2, 1878.

(7148) Permit contractor to sublet this route.

SEPT. 30, 1878.

(8518) Notify the Auditor of the Treasury for the Post-Office Dep't, that the sub-contract of Bradley Barlow and J. L. Sanderson (whose post-office address is Saint Albans, Vermont) for service on this route at $19,000 per annum from Oct. 1, 1878, to June 30, 1882, has been filed in this office.

$19,000	00
969	39
18,030	61
1,994	16
16,036	45
10,663	26
26,699	71
15,994	77
42,694	48
3,005	10
$39,689	38
3,392	85
36,296	53

OCT. 1, 1878.

(Amended Jan. 22, 1879.)

(8600) 1st. Omit service from Mineral Point to Ouray 10 miles; reduce service four trips per week from Lake City to Mineral Point 36 miles; change service so as to embrace Barnum between Lake City and Ouray, increasing distance 110 miles, and allow contractor $7,699.65 per annum additional pay, being pro rata, from October 1, 1878. Allow contractor one month's extra pay on service dispensed with.

(Modified Jan. 23, 1879.)

81 2nd. Reduce schedule time from 72 hours to 36 hours from Lake City to Barnum, 110 miles, and allow contractor $15,994.77 per ann. additional pay, being pro rata from Oct. 1, 1878.

JUNE 22, 1879.

(673) Amend order of October 1, 1878 (8600), so as to pay subcontractor in like amount.

JUN. 23, 1879.

(710) 1st. Modify order of Oct. 1, 1878 (8600), so as to omit service from Mineral Park to Ouray, 10 miles, and deduct from contractor's pay $969.39 per annum, being pro rata, and allow contractor one month's extra pay on service dispensed with.

2nd. Reduce service four trips per week on 36 miles, decreasing contractor's pay $1,994.16 per ann., being pro rata, and allow one month's extra pay on service dispensed with.

3rd. Allow contractor $10,663.26 per ann. additional pay, being pro rata for 110 miles increase in distance.

Leave Del Norte daily, at 1 p. m.; arrive at Ouray in 52½ hours.

Leave Ouray daily, at 6 a. m.; arrive at Del Norte in 52½ hours.

Adopt sch. Dec. 6, '81.

4. A certified statement of amounts paid for mail service upon route number 38146, as follows:

EXHIBIT B. CERTIFICATE F.

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT.

82 I, R. F. Crowell, Auditor of the Treasury for the Post-Office Department, do hereby certify the annexed to be a true and correct statement from the records of this office, of the account for the transportation of the mails on route No. 38146, from July 1, 1878, to June 30, 1882, of Luke Voorhees, contractor.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] (S'g'd) R. F. CROWELL,
Auditor.

83 STATEMENT OF ACCOUNTS.

Luke Voorhees, Colorado, contractor, in account with the United States.

DR.

Route.			
38146.	To collections, 3rd Apr., 1878		$1,458 56
"	" warrant favor B. Barlow, assignee		3,291 44
"	" " Barlow & Sanderson, subcontr's		10,920 58
"	" " " " "		10,673 62
"	" " " " "		10,673 62
"	" " " " "		10,673 62
"	" " " " "		10,478 56
"	" deductions, 4th qr., 1879		195 06
"	" 1st Apr., 1880		527 71
"	" warrant favor the Vermont Nat. Bank of At. Albans, Vt., assignee		9,650 57
"	" warrant favor J. L. Sanderson, att'y		250 42
"	" deduction, 2nd Apr., 1880		861 25
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt., assignee		9,061 10
"	" " " " " " "		100 00
"	" " " " " " "		324 00
"	" special agent's fare		20 50
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt., assignee		9,901 85
"	" " " " " "		9,922 35
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt., assignee		9,922 35
"	" " " " " "		9,907 44
"	" deduction, 2nd qr., 1881		14 91
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt., assignee		9,645 76
"	" " J. L. Sanderson, att'y		282 74
"	" amount due U. S. on route 38150, 3rd qr., '81, charged on this route		6,254 96
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt, assignee		2,819 18
"	" " " " "		9,069 36
"	" deduction, 1st qr., 1882		4 78
"	" " 2nd " "		20 60
"	" warrant favor the Vermont Nat. Bank of St. Albans, Vt., assignee		9,054 14
	Aug. 14, 1882		155,980 43

CR.

Route.		
38146.	By transportation, 3rd Apr., 1878	$1,750 00
"	" " 4th " "	10,673 62
"	" one month's extra pay on service dispensed with under order of Oct. 1, 1878	246 96
"	" t ansportation, 1st qr., 1879	10,673 62
"	" " 2nd " "	10,673 62
"	" " 3rd " "	10,673 62
"	" " 4th " "	10,673 62
"	" " 1st " 1880	10,178 28
"	" one month's extra pay on service dispensed with under order Jan'y 9, 1880	250 42
"	" transportation, 2nd qr., 1880	9,922 35
"	" remission of deduction	100 00
"	" " "	324 00
"	" transportation, 3rd Apr., 1880	9,922 35
"	" " 4th " "	9,922 35
"	" transportation, 1st qr., 1881	9,922 35
"	" " 2nd " "	9,922 35
"	" " 3rd " "	9,645 76
"	" one month's extra pay on service dispensed with under order of Aug. 24, 1881	282 74
"	" transportation, 4th qr., 1881	9,074 14
"	" " 1st " 1882	9,074 14
"	" " 2nd " "	9,074 14
		155,980 43

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT,
Washington, D. C., Nov. 12th, 1884.

(S'g'd) R. F. CROWELL,
Auditor.

5. A certified copy of certain papers signed by Barlow and Sanderson, authorizing payments to the Vermont National Bank, as follows:

EXHIBIT C.

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT.

I, D. McConville, Auditor of the Treasury for the Post-Office Department, do hereby certify the annexed to be true and correct copies of the original drafts on file in this office.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this eighth day of December, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] (S'g'd) D. McCONVILLE,

84 *Auditor of the Treasury for the Post-Office Department.*

CHEYENNE, WYOMING TER., *August 23rd*, 1878.

The Auditor of the Treasury for the Post-Office Department will please pay to Bradley Barlow, or order, whole amount dollars and cents, out of any moneys due me on route No. 38146, Garland to Ouray, in the State of Colorado, for the quarter ending Sept. 30, 1878.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) LUKE VOORHEES,
Contractor.

Witness:

(Signed) H. A. IDDINGS,
(Signed) H. GLAFCKE,
Postmaster at Cheyenne, Ter. of Wyoming.

Drafts must be witnessed by a postmaster and one other responsible party.

Drafts must be properly indorsed by the payee, and all subsequent holders, with their post-office addresses, before they will be placed on file.

Drafts will be filed subject to fines, deductions, the amount due the subcontractor in accordance with the act of Congress approved May 17, 1878, and any claim or demand the Post-Office Department may have against the contrator.

Drafts of attorneys and subcontractors are not received.

The courts have held that these drafts have no validity or binding obligation, and may be annulled by the contractor at any time before payment. They are received and placed on file solely for the accommodation of the parties interested.

(Endorsed): Draft. Route 38146. 3rd quarter, 1878. Bradley Barlow.

85 ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Bank of St. Albans, Vt., or order the whole amount due, dollars and cents, out of any moneys due me on route No. 38146 in the States of Colorado, for the quarter ending M'ch 31, 1879.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:

(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146, First quarter, 1879. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Bank of St. Albans, Vt., or order, the amount due, dollars and cents out of any moneys due me on route No. 38146 in the State of Colorado, for the quarter ending June 30, 1879.

86 I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractor.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster of St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 2nd quarter, 1879. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Brnk of St. Albans, Vt., or order, the amount due, dollars and cents out of any moneys due me on route No. 38146 in the State of Colorado for the quarter ending M'ch 31, 1880.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 1st quarter, 1880. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

87 ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Bank of St. Albans, Vt., or order, the amount due, dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending June 30, 1880.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 2nd quarter, 1880. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Bank, of St. Albans, Vt., or order, the amount due, dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending Sept. 30, 1880.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
88 (Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 3rd quarter, 1880. The Vermont National Bank, St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to the Vermont National Bank, of St. Albans, Vt., or order, the amount due, dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending Dec. 30, 1880.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 4th quarter, 1880. The Vermont National Bank, St. Albans, Vt. (Signed) C. N. Bishop, cashier.

89 ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank of St. Albans, Vt., or order the amount due, dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending M'ch 31, 1881.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft route 38146. 1st quarter, 1881. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank of St. Albans, Vt., or order the amount due, dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending June 30, 1881.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
90 (Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft route 38146. 2nd quarter, 1881. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank, of St. Albans, Vt., or order the amount due, dollars and cents, out of any moneys due me on route No 38146, in the State of Colorado, for the quarter ending Sept. 30, 1881.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft route 38146, 3rd quarter, 1881. The Vermont National Bank, of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank, of St. Albans, Vt., or order the amount due, dollars and cents, out of any moneys
91 due me on route No. 38146, in the State of Colorado, for the quarter ending Dec. 31, 1881.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft route 38146. 4th quarter, 1881. Pay J. L. Sanderson, or order, The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier. (Signed) J. L. Sanderson.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank of St. Albans, Vt., or order, the amount due dollars and cents, out of any moneys due me on route No, 38146, in the State of Colorado, for the quarter ending M'ch 31, 1882.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

92 (Endorsed:) Draft. Route 38146. 1st quarter, 1882. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

ST. ALBANS, VT., *February 27th*, 1879.

The Auditor of the Treasury for the Post-Office Department will please pay to The Vermont National Bank, of St. Albans, Vt., or order, the amount due dollars and cents, out of any moneys due me on route No. 38146, in the State of Colorado, for the quarter ending June 30, 1882.

I certify that this is the only draft drawn on said route for said quarter.

(Signed) BRADLEY BARLOW,
(Signed) J. L. SANDERSON,
Subcontractors.

Witness:
(Signed) JOHN W. LEE.
(Signed) B. D. HOPKINS,
Postmaster at St. Albans, State of Vermont.

(Endorsed:) Draft. Route 38146. 2nd quarter, 1882. The Vermont National Bank of St. Albans, Vt. (Signed) C. N. Bishop, cashier.

6. A certified copy of orders of the Postmaster-General making fines and deductions for failures and deficiencies in performance of service upon mail route number 38146, as follows:

93 EXHIBIT D.

POST-OFFICE DEPARTMENT,
Washington, D. C., December 8, 1885.

I certify that the annexed are true copies taken from the files and records of this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Post-Office Department to be affixed, the day and year above written.

[SEAL.] (S'g'd) WM. VILAS,
Postmaster-General.

94 Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, January 31st, 1880, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Mamosa to Ouray	Colo	L. Voorhees		
38146	Lake City to Mineral Point	"	do	1,459 69	4 97

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Decision.	
				Fines.	Deductions.
38146	Dec. 14, 15, 1879	Ouray	Failure to arrive		
38146	Dec. 28, 1879	Ouray	Behind time		70 42
	Dec., 1879	On the route	Service not performed well.		124 64

(Signed) D. M. KEY,
Postmaster-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, May 1st, 1880, inclusive:

No. of route.	Termini of route	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Alamosa to Ouray	Colo	L. Voorhees	36,393 45	49 85
38146	Garland to Ouray	Colo	do	41,198 79	54 43

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Fines.	Deductions.
38146	Jan'y 28 to M'ch 31, 1880	Belford to Lake City	No service on 25 miles		
	M'ch 4, 5, 27, 1880	Lake City	Behind time		
	During qr. 40 times, 1880	Ouray	Behind time; lost 86½ hours.		443 07
38146	Jan'ry 29, 30, 31, 1880	Ouray	No through mail		84 64

(Signed) D. M. KEY,
Postmaster-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, July 24, 1880, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Alamosa to Lake City	Colo	L. Voorhees	11,535 71	15 80
95] 38146	Lake City to Ouray	"	do	26,658 03	36 51

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Decision.	
				Fines.	Deductions.
38146	April 1 to May 11, 1880	Lake City and Belford.	No service; 25 miles		272 96
38146	April 13, 14, 15, 16, 18, 1880.	Ouray	Failure to arrive		
	April 13, 15, 16, 19, 1880.	Ouray	Failure to depart		
	Ap'l 17, 20, 26, 1880	Ouray	Exped., lost; mails due		
	April, 12 times "	Ouray	Behind time		
	April, 8 times, May 26, 1880.	Lake City	Exped., lost		
	April, 6 times, May 25, 1880.	Lake City	Late; lost 265 hours		588 29

(Signed) D. M. KEY,
Postmaster-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday October 9, 1880, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Remission.
					Half trip.
38146	Lake City to Ouray	Colo	L. Voorhees	26, 658 03	36 51

No. of route.	Remission.	Place of delinquency.	Nature of delinquency.	Decision.	
	Date of delinquency.			Fines.	Deductions.
38146	Remit, $324.00.	(*)	(*)	(*)	(*)

*Of the reduction reported to auditor July 24th, 1880, it appears that failures were caused by unusual and frequent snow-storms.

(Signed) J. L. FRENCH,
Acting Second Asst. P. M.-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, November 6, 1880, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Remission.
					Half trip.
38146	Lake City to Ouray	Colo	L. Voorhees	26, 658 03	36 51

No. of route.	Remission.	Place of delinquency.	Nature of delinquency.	Decision.	
	Date of delinquency.			Fines.	Deductions.
38146	Remit, $100.00.	(*)	(*)	(*)	(*)

*Of the deduction reported to auditor July 24th, 1880, result of clerical error.

(Signed) THOS. J. BRADY,
Second Assistant P. M.-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, July 30th, 1881, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Alamosa to Ouray	Colo	Luke Voorhees	15,994 77	21 91

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Decision.	
				Fines.	Deductions.
38146	April 12, 1881 April 13, 1881	Mineral Point do	Failure to arrive Failure to depart		14 91

(Signed) H. D. LYMAN,
Acting Second Asst. P. M.-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, April 22, 1882, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Lake City to Mineral Point	Colo	L. Voorhees	1,495 62	4 78

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Decision.	
				Fines.	Deductions.
38146	Jan'ry 12, 1882 Jan'ry 13, 1882	Mineral Point do	Failure to arrive Failure to depart		4 78

(Signed) H. D. LYMAN,
Acting Second Asst. P. M.-General.

Ordered, That fines be imposed on contractors and deductions be made from their pay; also, that fines and forfeitures be remitted in the following cases, for the week ending Saturday, July 29, 1882, inclusive:

No. of route.	Termini of route.	State.	Contractor's name.	Annual compensation.	Half trip.
38146	Lake City to Ouray	Colo	L. Voorhees	36,316 53	

No. of route.	Date of delinquency.	Place of delinquency.	Nature of delinquency.	Decision.	
				Fines.	Deductions.
38146	May 25, 1882		Lost mail pouch	20 00	

(Signed) H. D. LYMAN,
Acting Second Assistant P. M.-General.

96 7. The following map of the route 38146, as it originally existed, and as it was after the order of October 1st, 1878.

97 J. L. KLINE, being called as a witness for the plaintiffs, and duly sworn, gave testimony which tended to prove that he was engaged in carrying the mail for the defendants from Barnum to Ouray, from November 1st, 1878, up to some time in February, 1879, and that not more than eighteen horses and six or seven men were required to perform said service, and that eleven men and twenty-two horses would have been sufficient to carry the mail from Lake City to Ouray, by way of Barnum; that the average speed actually traveled was about five or six miles an hour on this road; that he was acquainted with the road between Lake City and Ouray, by way of Mineral Point, and that it was one of the worst roads in the State, impassable for wheeled vehicles of any kind, and during most of the year traversable only by men on snow shoes.

Whereupon the counsel for the plaintiffs asked the witness the following question:

Q. Now, captain, taking the whole of the year through, winter and summer altogether, all considered in one, which was the least difficult to perform, to carry the mail over this mountain, by way of Mineral Point to Ouray, at the rate of a mile and a half per hour, or to transport it by way of Barnum around the stage road at a rate of 3 miles an hour?

(To which question the defendants, by their counsel, then and there objected, for the reason that the same was irrelevant and immaterial, and the court sustained said objection, to which ruling of the court the plaintiffs, by their counsel, then and there excepted.)

98 And thereupon the witness gave further testimony tending to prove that it would have required twenty-five or thirty men to have carried the mail from Lake City to Ouray, by way of Mineral Point. Thereupon the counsel for the plaintiffs asked the witness the following question:

"About what would you have to pay those men apiece for their services a month, for instance?"

(To which question the defendants, by their counsel objected, and the court sustained said objection, to which ruling of the court the plaintiffs, by their counsel, then and there excepted.)

And thereupon the witness gave further testimony tending to prove that the road from Lake City to Ouray, by way of Barnum, was a very good road; that, by a measurement made in 1877, it was found to be $100\frac{7}{10}$ miles in length, and that subsequently a toll road was constructed by one Otto Mears, between the same points, parts of which new road were finished during the time witness was carrying the mail.

Thereupon the counsel for plaintiffs asked the witness the following question:

"I will ask you if the Mear's road shortened the route between Lake City and Ouray to any extent; and, if so, to what extent?"

(To which question the defendants, by their counsel, then and there objected, for the reason that the same was immaterial and irrelevant, and the court said:

The COURT. The circumstance that the distance is less than 110 miles from Lake City to Ouray, if that be a fact, is not relied on in this com-

3rd. Allow contractor $10,663.26 per annum additional pay, being pro rata for 110 miles increase in distance.

FRENCH.

Special. French. Order No. 710; date, Jan. 23, 1879; day-book, page 42; wrote P. M. & contractor, 187.

No. 2045.

Date, September 30, 1878; State, Colorado; No. of route, 38146; termini of route, Garland and Ouray; length of route, 196 miles; No. of trips per week, seven (7); contractor, Luke Voorhees; pay, $19,000 per annum.

Notify the Auditor of the Treasury, for the Post-Office Department, that the subcontract of Bradley Barlow & J. L. Sanderson (whose post-office address is Saint Albans, Vermont), for service on this route at $19,000 per annum, from October 1st, 1878, to June 30, 1882, has been filed in this office.

BRADY.
R.

Order No. 8518; date, Sept. 30, 1878; day book, page 20; wrote P. M. & contractor, 9; 30, 1878.

Date, Oct. 1, 1878; State, Colorado; No. of route, 38146; termini of route, Garland and Ouray; length of route, 196 miles; No. of trips per week, seven (7); contractor, Luke Voorhees; pay, $19,000 per annum.

104 J. L. Sanderson suggests that in lieu of service on route No. 38166, Barnum to Ouray, service on this route be changed so as to embrace Barnum, increasing distance 110 miles, omitting service between Ouray and Mineral Point, 10 miles, and reducing service to three trips per week between Lake City and Mineral Point, 36 miles, and to curtail service on route No. 38150 so as to end at Barnum, saving 21 miles, $5,179.51 per annum.

Postmaster Lake City reports service on that portion of this route and Ouray impracticable on account of heavy snows. Charles Adams, special agent P. O. Department, reports *that* portion of route between Lake City and Ouray, via Burrows Park and Mineral Point, as impracticable eight months in the year, except by snow-shoe service, and suggests change of service from Lake City via Barnum to Ouray.

Curtailment, 10 miles	$969 38	a year.
Reduce, 4 trips 36 "	1,994 15	" "
Curtailment, 38150	5,179 51	" "
Disc., 38166	6,750 00	" "
Total decrease	$14,893 04	
Cost of increased distance, 110 miles	10,663 18	a year.
Expedition, 110 miles	15,994 77	" "
Total increase	$26,657 95	" "
" decrease	14,893 64	" "
Actual increase	11,764 91	" "

1st. Omit service from Mineral Point to Ouray, 10 miles; reduce service four trips per week from Lake City to Mineral Point, 36 miles; change service so as to embrace Barnum between Lake City and Ouray, increasing distance 110 miles, and allow contractor $7,699.65 per annum additional pay, being pro rata from October 1st, 1878. Allow contractor one month's extra pay on service dispensed with.

2nd. Reduce schedule time from 72 hours to 36 hours from Lake
105 City to Barnum, 110 miles, and allow contractor $15,994.77 per annum additional pay, being pro rata, from October 1st, 1878.

BRADY.

O'd'red, No. 8600. Date, Oct. 1st, 1878. Day-book, page 21. Wrote P. M. & contractor 10, 1st, 1878. Do this. Brady.

WASHINGTON, *Sept. 30th*, 1878.

Hon. THOS. J. BRADY,
Second Asst. Postmaster-General:

SIR: To perform the service on route No. 38146, between Lake City and Ouray, on the present schedule of seventy-two hours, requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require (66) sixty-six horses and twenty-two men.

J. L. SANDERSON.

Subscribed and sworn to before me this 30th day of September, 1878.
[SEAL.] J. H. HERRON,
Notary Public.

To the Postmaster-General:

We, the undersigned citizens of Ouray and Hinsdale Counties, respectfully ask you to establish a daily service of mail from Lake City to Ouray, via Cimaron and Los Pinos Agency.

The distance from Lake City to Ouray by the proposed route is one hundred and ten (110) miles, over the whole distance of which there is a wagon road over which the mail can be carried the year round.

The present route by which we now receive a daily mail is route
106 number , via Burrows Park and the forks of the Animas; said route runs over exceedingly high ranges of mountains over

which the mail can only be carried on horseback at the most favorable season of the year, and for about six months of the year it is impossible to take the mail over it in any way, greatly to the detriment of all the business interests of Ouray County.

ROBERT G. HOWELL,
Lake City, County Judge of Hinsdale Co.
O. D. DOUNTAM,
Lake City, County Clerk of Hinsdale Co.
JOHN S. HOBBS,
Lake City, Commissioner Hinsdale Co.
JAMES HAWELHAN,
Lake City, Sheriff Hinsdale County.
J. B. ABBOTT,
Lake City, Surveyor Hinsdale Co.
J. C. BELL,
Lake City, Co. Attorney.
GEO. A. KELLOGG,
Lake City, Treasurer Hinsdale Co.
WM. STORY,
Attorney for town of Ouray.
C. P. CUTLER,
Ouray, County Judge.
D. A. LONG,
Ouray, County Clerk.
L. BERRY, *Ouray, Commissioner.*
NATHAN BROWNGARD,
Ouray, Commisssioner.
NATHAN WARD, *Ouray, Sheriff.*
WM. GARNETT,
County Commissioner.

On the back of which said petition appeared an indorsement as follows:

107 1878, Sept. 20. Misc. Colorado.

Petition of citizens of Ouray and Hinsdale Counties, Colo., endorsed and recommended by Hon. H. M. Teller, Gov. Routt, and others, asking for daily service from Lake City to Ouray, via Cimaron and Los Pinos Agency.

I have examined into the necessity of the service petitioned for in this & the accompanying petition, and am convinced that the prayer of the petitioners should be granted. I therefore earnestly recommend that it be done without delay.

N. M. TELLER.

I fully concur in the above recommendation.

JOHN L. ROUTT.

Respectfully referred to the Hon. Second Asst. P. M. General for his favorable consideration. I have always maintained that the daily service between Lake City and Ouray as at present established will prove imprac-

ticable during eight months of the year, and can only repeat that if the service to Ouray is to be had during those months it will become necessary to change the route as asked for in the within petition at once and before winter sets in.

CHARLES ADAMS,
Spl. Agt. P. O. D.

TURNER: Is this a route? I invite proposals from contr's present.
BRADY.

[Post Office Department. Office of Special Agent Charles Adams, special agent P. O. D., Denver, Colorado.]

FEBRUARY 7TH, 1878.

Hon. SECOND ASST. P. M. GENERAL,
Contract Division, Washington, D. C.:

108 SIR: I have the honor to call your attention to mail route No. 38145 as advertised, to invite proposals for contracts to take effect on July 1 proximo.

That portion of the route between Lake City, Colo., and Ouray, via Burrows Park and Mineral Point, cannot possibly be served during eight months of the year on account of natural difficulties to be encountered, deep snows and difficult trails over the mountains, unless by snow-shoe service, which would be unreliable, costly, and unsatisfactory to the people.

A good wagon road open all the year from Lake City, via Barnum, to Ouray, although somewhat longer, is the commonly traveled route, on which the mail at present is being carried regularly and satisfactorily, and this route should be all means be designated as the proper mail route for the extreme western portion of Colorado.

Service on the route from Lake City, via Sherman, Burrows Park, Tellurium, Animas Forks, and Eureka, to Howardsville should be three times a week in summer and once a week in winter, and would give ample mail facilities to the people. A branch route from Animas Forks to Ouray, via Mineral Point, should be maintained as it is at present, but the main route to Ouray should be via Barnum.

The distance from Garland to Ouray is about 250 miles, and I would recommend that proposals in accordance with the above recommendations be advertised specially and at once, so that the service be not interrupted.

Very respectfully,

CHARLES ADAMS,
Spec. Agt. P. O. D.

On the back of which said letter appeared the following, to wit:

109 February 8, 1878. 38146. Colorado. Report of Special Agent Adams relative to mail service in Ouray, Hinsdale, and San Juan Counties, Colorado.

WASHINGTON, *Sept. 30th*, 1878.

Hon. THOS. J. BRADY,
Second Asst. Postmaster-General:

SIR: In lieu of the temporary service ordered between Barnum and Ouray I would respectfully suggest that such service be made by embracing Barnum on 38146 Garland to Ouray, increasing distance (110) one

hundred and ten miles, omitting service between Mineral Point and Ouray ten miles, and giving three-times-a-week service to Sherman, Burrows Park, Telurium, and Mineral Point, and curtailing route 38150 Saguache to Lake City twenty miles, and expediting the schedule from the present at pro rata of (72) seventy-two hours to thirty-six hours between Lake City and Ouray.

Very respectfully,

J. L. SANDERSON.

On the back of which said letter appeared the following, to wit: 1878, Sept. 30. 38146, &c. Colorado. Suggestions of J. L. Sanderson as to change of service. Turner do this. Brady.

LAKE CITY, COLO., *Feb.* 5, 1878.

THOS. J. BRADY,
Second Assistant Postmaster-General:

D'R SIR: Your communication of Jan'y 28 came to hand to-day, and I hasten to reply. Route # 38146 from Garland, via Lake
110 City to Ouray, going from Lake City to Sherman, Burrows Park, Tellurium, Animas Forks, Mineral Point [left out], to Ouray, is impracticable for this reason: it is impossible for an animal to go beyond Burrows Park this winter, and this one is very mild so far. Last winter they had to snow-shoe from Sherman. The mail would have to be carried on snow shoes from Sherman to about 5 miles beyond Mineral Point *on snow shoes;* only about 15 miles of the distance could be carried the year round on a stage or pack-animal; would have to snow-shoe. The mail that leaves this office for Ouray is a very heavy one, from 20 to 30 miles every winter, and winter is our longest season here, but if the mail was carried *to* from Lake City Barnum, and from Barnum to Los Pinos, Hot Springs, & Ouray, it would be a longer route, but would be the most practicable route for all seasons of the year.

It can be carried on a stage the year round this way.

Respectfully,

HENRY D. RUGGLES, *P. M.*

Indorsed and appearing on the back of said letter was the following: February 13, 1878. 38146. Colorado. Communication from postmaster at Lake City relative to service from Lake City to Ouray.

This article of contract made this 28th day of September, A. D. 1878, between Luke Voorhees, contractor, with the United States Post-Office Department, for transporting the United States mails on route No. 38146, from Garland to Ouray, State of Colorado, and Barlow and Sanderson, subcontractors, witnesseth, that whereas the said Barlow & Sanderson have been accepted as subcontractors for transporting the United States
111 mails on route No. 38146, from the first day of October, A. D. 1878, to the thirteenth day of June, A. D. 1882.

Now, therefore, the said Barlow & Sanderson do covenant & agree with the said Luke Voorhees, and by these presents have covenanted and agreed, to transport the United States mails on the above-named route No.

38146, and for the period above mentioned; that they, the said Barlow & Sanderson, will perform said service in strict accordance with the postal laws of the United States, the regulations of the Post O. Department, and the order of the Postmaster-General, and that they will hold themselves, the said Barlow and Sanderson, responsible in damage to the said Luke Voorhees for any and all fines & penalties that may ensue from any violation of said laws, regulations, and orders. It is also covenanted and agreed by the said Luke Voorhees, in consideration of the above undertaking of said Barlow & Sanderson, to transport the United States mails on said route No. 38146, and for the further consideration of one hundred dollars (the payment of which is hereby acknowledged), that they, the said Barlow & Sanderson, shall be entitled to and receive the entire pay that is or may become due to him, the said Luke Voorhees, contractor on said route No. 38146. This agreement to bind the heirs and legal representatives of the parties hereto.

Witness our hands and seals this 28th day of Sept., A. D. 1878.

LUKE VOORHEES. [SEAL.]
BARLOW & SANDERSON. [SEAL.]

Witness:
H. A. IDDINGS.
M. SALISBURY.

On the back of which contract appears the following, to wit: Sept. 28, 1878. 38146. Colorado. Subcontract of Bradley Bar-
112 low & J. L. Sanderson.

J. L. SANDERSON, being called as a witness, gave testimony tending to prove that he had been engaged in the business of mail carrying for forty-five years; that he had been associated with the defendant Barlow as a partner in mail contracts from about the year 1860 to 1880; that the duties of said Barlow were to take care of the Washington business, which was procuring contracts, seeing to receiving money, &c., whilst the duties of witness were to take care of all the rolling stock in the western country; that the said firm had general manager or superintendent and two or more division superintendents and a cashier in the State of Colorado, who took charge of the business in that State; that about the 25th of September, 1878, witness was called to Washington by defendant Barlow concerning the change in route 38146, at which time he received the first intimation that the Post-Office Department desired a change in that route; that he had been over the original route, 38146, except the mountainous part thereof between Lake City and Ouray; that he was the person who made the affidavit of September 30th, 1878, concerning this service; that the contemplated change made in reality almost a new route; that the data upon which said affidavit was made was furnished him by the contract clerk of the Post-Office Department; that he had never been over the route, nor had he received any direct information concerning the route contemplated by the change other than that furnished by the Department at Washington through their maps, figures, and petitions; that the contract for carrying over the new route was actually consum'ated on the 30th
113 of September, 1878, contemplating the commencement thereof on the next day, October 1st, 1878; that he immediately advised his agent by telegraph to stock the road and put on the service at once; that

his attention was called to the letter of General Adams and the petitions and endorsements asking for the change; that his letter addresses to the Second Assistant Postmaster-General was based upon what he had seen in those petitions and recommendations, and was written at the request of the officers of the Department; that the affidavit made by him was made at the request of the contract clerk of the Post-Office Department, and was based on the recommendation of the people of Colorado and General Adams; that the 72-hours schedule was taken from the mountain-route time, which was a mile and a half an hour, and was fixed by the Department themselves on the 30th day of September; that his affidavit and estimate of 11 men and 22 horses to perform the service over the new and increased route in 72 hours was made at the request of the contract clerk (Mr. Turner) of the Post-Office Department; that being asked by said clerk how much stock it would take to perform the service in 72 hours, witness replied that it was all wild, that he had never been over the road; and being further asked by said clerk to base it as nearly as he could, witness replied it would only be a jump, and thereupon made the estimate 11 men and 22 horses, and brought in the statement which he now admitted was an error on his part; that at the time of making the statement all was blind to witness and to the Department; that when the proposition of expedition was made to witness Mr. Turner asked witness what amount of stock it would take in 36 hours, to which witness in like manner replied that it was all wild to him, that he had never been over the
114 route, but would make as close, good statement as he could, and thereupon estimated 22 men and 66 horses, but got it too high, in case he were to make the statement again; that such estimate was witness's judgment, and that he did it as well as he knew how, as near as he thought was right; that from witness's experience as a mail contractor, and with the creation of new routes in new territories, he considered the estimates by him at that time were fair; that he made them according to the best of his judgment at the time, but admitted, in view of facts, as subsequently ascertained, that he made a mistake in the estimate of 11 men and 22 horses on the 72-hour schedule, as all was new and wild, and it was a mistake he could not help.

That witness knew at time Turner, the contract clerk, gave him schedule time of 72 hours that it would be a long schedule for a road such as was described in petitions for change; that witness never told any Government officer that the schedule time of 72 hours was excessive, but made estimate that according to that estimate he was to use 66 horses and 22 men; that up to July, 1880, less than 30 horses and 12 men were used; that in July, 1880, four-horse coaches were put on the route for general staging business, not for mail entirely; that then about 50 horses and 22 men were put on the route; that witness never corrected his estimate of 66 horses and 22 men upon which he was drawing pay, but, though not using such number, continued to draw pay from the Government therefor.

Thereupon defendants' counsel asked as follows:

115 Q. How many men and horses, in your judgment, would it take to traverse that route on a schedule of 72 hours?

(To which question the plaintiffs' counsel objected, for the following reasons, as stated by Mr. Douglass: "This Mr. Sanderson made an affidavit, in the most positive form possible, in which he swore that to carry the

mail on a schedule of 72 hours 22 horses and 11 men would be required, and that upon a schedule of 36 hours 66 horses and 22 men would be required. Now they find from our proof that it will be utterly impossible for them to show that the second branch of that affidavit was true; they admit that was false, but seek to excuse themselves from the effect of one falsehood by showing that there were two. We contend that they are estopped from so doing." But the court overruled said objection, to which ruling of the court in overruling said objection the plaintiff, by its counsel, then and there excepted.)

To which objection the witness replied as follows:

A. As I said before, they asked me all these things, the clerk of the Department did. It was the best of my judgment. I admit I made an error; I could not help it; it was all wild. I say you can take and carry that mail in 72 hours with 12 horses and extra horses, making 14, and 6 or 7 men. I made a mistake there; I admitted it was wild—that was wild; it was new—everything was new.

Upon cross-examination the witness identified the following letter as having been signed by him, and the same, with the endorsements theron, was offered in evidence by counsel for the plaintiffs:

116 WASHINGTON, *Sept. 30th*, 1878.

Hon. THOS. J. BRADY,
Second Asst. Postmaster-General:

SIR: In lieu of the temporary service ordered between Barnum and Ouray, I would respectfully suggest that such service be made by embracing Barnum on 38146, Garland to Ouray, increasing distance (110) one hundred and ten miles, omitting service between Mineral Point and Ouray, ten miles, and giving three-times-a-week service to Sherman, Burrows Park, Telurium, and Mineral Point, and curtailing route, 38150, Sauguache to Lake City, twenty miles, and expediting the schedule from the present at pro rata of (72) seventy-two hours to thirty-six hours between Lake City and Ouray.

Very respectfully,

J. L. SANDERSON.

On the back of which letter was indorsed the following, to wit: 1878, Sept. 30. 38146, &c. Colorado. Suggestions of J. L. Sanderson as to change of service. Turner, do this. Brady.

BRADLEY BARLOW, being called as a witness for the defendants, gave testimony tending to prove that he had been engaged with J. L. Sanderson about 20 years in the business of mail carrying in many of the States and Territories of the United States; that his part of the business was to obtain contracts from the Government of the United States, make settlements with the Department for such services, and receive payments therefor and remit the same to Mr. Sanderson, who had the active management of the business in the various places where it was carried on; that he was in Washington about every quarter, and spent a considerable portion
117 of his time there in attending to his branch of the business and in looking after conflicting interests between the defendants and other contractors from the Government; that he was at Washington in the

month of September, 1878; that the orders put in evidence by the defendants, by which route No. 38146, from Lake City to Ouray, was changed via Barnum, and the time expedited and additional compensation allowed, were made under the following circumstances, viz: That witness's attention was called to the subject by the Second Assistant Postmaster-General and the clerk in the contract office of the Department, who said that there were representations in the Department that it would be impracticable to carry the mail over the route as it then existed, and that strong pressure had been brought upon the Department to change the route in the way it was subsequently changed by the orders theretofore put in evidence; that upon the recommendations being shown to him (being the same documents accompanying the orders changing the route, &c.), he was asked if the defendants would be willing to do the service in that way; that the matter was discussed, and he sent or telegraphed for defendant Sanderson to come to Washington; that there were repeated conferences, and the officers seemed very desirous about it, in view of the representations that had been made to them and of the petitions to change the service in the original contract and turn it by way of Barnum; that such conversations preceded the making of the orders for the change; that the route in question had been awarded to another contractor (Mr. Voorhees), the defendants having had the contract for the previous four years, and that witness was at Washington for the purpose of negotiating for the subcontract under Voorhees; that in the mean time the defendants were performing the service for Voorhees; that defendant Sanderson
118 came to Washington a few days before the 1st of October, 1878, when the order changing the route was made; that on the same day on which the route was changed the time was expedited from 72 hours to 36 hours; that such expedition was not made at the request of himself or defendant Sanderson; that the Second Assistant Postmaster-General and the contract clerk spoke to him about it; that he was present when the statement or affidavit of the 30th of September, 1878, was made by the defendant Sanderson; that the Second Assistant Postmaster-General said that the Department desired to expedite the schedule of time, and that the service would be paid for according to the increased cost of the service pro rata with the original contract, and for that purpose the affidavit was made; that the schedule of 72 hours mentioned in the affidavit or statement was arrived at by the chief clerk in the Department by making a schedule in proportion to the schedule on the original route from Lake City to Ouray, which was 30 hours for 46 miles, and which would make the schedule on the increased distance of 110 miles about 72 hours; that the chief clerk and the Second Assistant Postmaster-General fixed the schedule, and the contractors had nothing to do with fixing it; that on the 30th of September, 1878, at the time the affidavit of defendant Sanderson was made there was no schedule of 72 hours, but there was a schedule of 30 hours for 46 miles, and there was no service on that day that required a schedule of 72 hours; that neither defendant Sanderson nor witness knew anything about the practicability of the route that was recommended, but based all they did upon such information as the Department gave them; that witness had never been over the route recommended, and defendant Sanderson said he had never been; that it was a sup-
119 positious thing; that the officers of the Department knew that

neither defendant Sanderson nor witness had ever been over the route, because witness so informed them; that defendant Sanderson based his estimate on the service under a schedule, which he considered would cost about the proportion to which he testified, but of the route of which he knew nothing save from such representations as were in the Department; that neither witness or defendant Sanderson had any facts or knowledge about that route, except that they were running the service and carrying the mail upon that portion of it between Barnum and Lake City on another contract, which was all of the proposed new route of which they had any knowledge; that the information which they received from the officers of the Post-Office Department was that there had never been any mail carried over the residue of the proposed new route by the Department, but that it was a practicable route for a wagon, being an old road a portion of the way, and that the distance was 110 miles; that the officers of the Department had determined to make the changes which they did make, and requested the defendants to make an estimate of what the expedition would cost; that the officers of the Department determined, if the schedule was satisfactory, they would make an order changing the route; that the said officers knew that the defendants had no personal knowledge of the matters stated in the affidavit; that the orders making the change were made on the 1st of October, to which defendants gave their consent on the 30th of September, the orders going into effect the next day.

Thereupon defendants' counsel asked the following question:

Q. I wish you would state, Mr. Barlow, to the court and jury,
120 under what circumstances, so far as you know, that order was made, and what led to it. What brought it about?

(Objected to.)

Mr. DOUGLAS. The order stands for itself; all that precedes it is merged in it. On general principles the defendants cannot give in evidence any parole testimony to impeach or impair the contract. Do you propose to explain or modify it?

Mr. DIXON. We propose to have before this court and jury the circumstances under which that contract was made.

(Objection overruled. To which ruling of the court, in overruling said objection, the plaintiffs' counsel then and there excepted.)

The witness having further testified in regard to the circumstances attending the change of said route, the defendants' counsel asked the witness:

Q. State whether or not that affidavit was not made in the expectation of the change to 110 (referring to the sworn statement of J. L. Sanderson)?

(Objected to. Objection overruled. To which ruling of the court, in overruling said objection, the plaintiff, by its counsel, then and there excepted.)

Upon redirect-examination, the witness having testified that Sanderson came to Washington in September, 1878, at his request, the defendants' counsel asked the following question:

Q. This letter of Mr. Sanderson's, dated Sept. 30th—this letter that your attention was called to—do you know how Mr. Sanderson came to write that letter?

(Objected to by plaintiffs' counsel, because Mr. Sanderson is the best

121 witness upon that subject. Objection overruled by the court. To which ruling of the court in overruling said objection, the plaintiff, by its counsel, then and there excepted.)

HARLEY SANDERSON, being called as a witness for the defendants and duly sworn, gave testimony tending to prove that he was familiar with the route from Garland to Ouray, and was a general superintendent for the defendants upon this and other routes, and also further testimony upon other points not material to the issues in this proceeding in error, thereupon the defendants' counsel asked the witness the following question:

Q. How many men and horses, in your judgment, would it have required to carry that mail from Lake City to Ouray over this extended route on a schedule of 72 hours or three days?

(To which question the plaintiffs' counsel objected, because the defendants are estopped from denying what their own affidavit states. But the court overruled said objection; to which ruling of the court in overruling said objection, the plaintiff, by its counsel, then and there duly excepted.)

To which question the witness replied as follows:

A. I should think 12 or 14 horses could do it.

Q. On three days' time?

A. Yes, sir; I should think 12 or 14 horses could do it.

And thereupon, after further testimony for the defendants, which is immaterial to the issues involved in this proceeding in error, the defendants rested their case.

122,123 Thereupon W. W. STODDARD was called as a witness for the plaintiff in rebuttal, and being duly sworn, gave testimony tending to prove that he was postmaster at Ouray during the month of October, 1878, and that in his official capacity he made out reports of the arrival and departure of the mail at Ouray during said month in duplicate, one of the same being forwarded to Washington at the end of said month; and the witness identified the following as one of said duplicates:

Trips per week, 3.

Register of arrivals and departures for the month of October, 1878. *Post-office at Ouray, County of Ouray, State of Colorado. Route No.* 38146, *from Garland to Ouray, Colo. Contract time of arrival*, 7 *p. m.; contract time of departure*, 6 *a. m. Name of contractor, Luke Voorhies. Name of carrier, George Gardner. Mode of carrying the mail, horseback and buckboard.*

Days of the week and month.	Hour of arrival.	Hour of departure.	Days of the week and month.	Hour of arrival.	Hour of departure.
Tuesday, 1	7 p. m.	6 a. m.	Thur., 17	.....	6 a. m.
Wed., 2	7 p. m.	6 a. m.	Fri., 18	7 p. m.	.....
Thur., 3	7 p. m.	6 a. m.	Sat., 19	.....	6 a. m.
Fri., 4	7 p. m.	6 a. m.	Sunday, 20	7 p. m.	.....
Sat., 5	7 p. m.	6 a. m.	21	.....	.....
Sunday, 6	7 p. m.	6 a. m.	Tues., 22	.....	6 a. m.
Mon., 7	7 a. m.	6 a. m.	Wed., 23	7 p. m.	.....
Tues., 8	7 a. m.	6 a. m.	Thur., 24	.....	6 a. m.
Wed., 9	7 a. m.	6 a. m.	Fri., 25	7 p. m.	.....
Thurs., 10	.....	6 a. m.	Sat., 26	.....	6 a. m.
Fri., 11	7 a. m.	.....	Sunday, 27	7 p. m.	.....
Sat., 12	.....	6 a. m.	28	.....	.....
Sunday, 13	7 a. m.	.....	Tuesday, 29	.....	6 a. m.
Mon., 14	.....	.....	Wed., 30	7 p. m.	.....
Tues., 15	.....	6 a. m.	Thursday, 31	.....	6 a. m.
Wed., 16	7 a. m.	.....			

The mail was carried daily up to Oct. 10, '78.
Duplicate.
Certified to be correct by W. W. Stoddard, P. M.
Duplicate.

(Endorsed:) Time reports, October, 1878.

124 The above report was thereupon offered in evidence by the plaintiffs' counsel (the right to offer the same as a part of the plaintiffs' case having been previously reserved).

And no further evidence being offered, either by the plaintiffs or the defendants, the court of its own motion said:

"I will get you gentlemen to state the propositions upon which you rely, the questions of fact upon which you expect to recover, and I will see whether I can agree with you."

Mr. DOUGLASS. In the first place, there is a small item of about twelve or thirteen hundred dollars, with interest, which was paid for the month of October for service not performed. Four-sevenths of the service by way of Barnum on this 110 miles of road was not performed; the amount of that is something like twelve or thirteen hundred dollars with interest; that is, of course, a small item.

The next proposition upon which we seek to recover is the misunderstanding or the mistake of fact of the Department in making allowance for additional service or additional speed, based upon the theory that it required sixty-six horses and twenty-two men to perform the service, when in fact it only required, as we say, not over eleven men and not at any time over twenty-eight horses. Now, there are various ways by which we reach that conclusion, if your honor wishes me to state them.

We also seek to recover upon the ground that the allowance in this case for additional service was in violation of section 3960 as well as 3961.

125 Section 3960 provides that the allowance for additional service shall not exceed the exact proportion which the original service bears to the compensation in the original contract. We contend that the original service in this case means the whole service in the original contract, and must include that portion of the road which lay between Garland and Lake City, as well as that which lay between Lake City and Ouray. If that is true, you must take the average speed under the whole contract of three and one-half miles an hour at the rate of $96 a mile per year as the true basis. But upon the 110 miles by way of Barnum the service was performed at the rate of three miles an hour, or less than the average speed on the route as originally let, yet the allowance on the 110 miles is two and *and* one-half times as much, and we contend that that was a clear violation of the section, which says that such allowance shall not be in excess of the exact proportion. We contend the original service means the whole service, not some isolated portion. Or, if we take the position of the other side, & take this forty-six miles over the mountain trail as the original service within the meaning of the law, & which the statute makes the basis of computation for the 110 miles, if we take that as the basis for schedule time, we must also take it as the basis for stock and carriers, because we must be consistent in this thing. If it constitutes the basis of the important element of time, it must also constitute the basis for stock and carriers; and therefore, in order to compute under the law the item of com-

pensation, we must take the number of horses and men necessary to transport the mail from Lake City to Ouray over the mountain trail. Now, from the evidence in the case, that number appears to have been ten horses and five men for forty-six miles. Taking that as a basis for computing what it would be for 110 miles, we find it amounts to just what Mr. Sanderson swore to in the first half of his statement. Taking the 22 horses and 11 men as the basis for computation in connection with the number used on the 36-hour schedule by way of Barnum, we find the allowance to have been largely in excess of what could be allowed under section 3961.

126

Thus from every standpoint the allowance was made illegally as well as in mistake of fact, and we claim the right to recover accordingly as contemplated by section 4057 and under the principles of common law.

The COURT. The proposition advanced by the Government is not altogether acceptable to me.

Mr. DIXON (addressing the court) said: It is hardly necessary for me to occupy any time in discussing section 3960; that section provides that where a mail route is extended, that is to say, the distance is enlarged, that the carrier shall have compensation in proportion to the original contract price; as, for example, he is carrying a hundred miles at a given rate of speed per mile, and at a given number of dollars per mile for that carriage. If that road is doubled in length, that section, as I understand it, gives the carrier the same rate for the additional transportation that he had under his original contract. Now these contracts are all let, as your honor will see, with a view to the application of this provision of the statute. This contract provides in substance, as a part of this contract, that if this route should be extended that the additionel price should be paid; so the proof in this case being, if your honor please, that this route was extended 110 miles, and the orders and evidence here showing that for that 110 miles increase, which under the pleadings the court has not permitted to be controverted, it is a mere matter of computation that the money which we received for that 110 miles (should be exactly in proportion under the schedule).

127

This contract divides this route from Garland to Ouray into two distinct portions. I suppose that is a common way of letting these——

The COURT. They divided it as to time, but not as to compensation.

Mr. DIXON. Of course the bidder had to bid for one entire compensation per mile, or in a gross sum. It is a matter of fact that *that* the Government letting this contract for a gross sum per annum, they don't let by the mile, but in reckoning the increased distance the way this line was increased on the Garland end, or on the Ouray end, wherever it was increased, there is no other way, I submit, if your honor please, of applying that statute, saying we should have our pay increased in proportion, except it was done by the mile.

The COURT. It is not necessary to go upon that principle, because the statute is simply limiting; it says it shall not be in excess; it was not necessary to adopt that principle at all in letting any.

Mr. DIXON. The contract provides that when it is increased that we get it in proportion; that is a part of our contract.

The COURT. The statute does not provide that you shall have so much a mile for the extension; but the contract says, and the statute says, it shall not be in excess of that.

Mr. DIXON. I am reading on the second page of this: "It is
128 hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or change the schedule or termini of the route, alter, increase, or decrease, or extend the service, in accordance with law, he allowing a pro rate increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is necessary. Now, that clause divides itself into two parts; the first part of that stipulation is, if they increase this service they shall pay us pro rata. Now, if we agreed under the original contract to carry this mail for the distance of forty-six miles at $96.93 a mile, which I believe is the exact sum which was allowed for the whole, and they increased it 110 miles, then we should have 110 times $96.93 added to our pay; that is the pro rata.

The COURT. If you put it at the rate of speed on the other end of the line, it would be an entirely different thing.

Mr. DIXON. The only question we have got to discuss before this court is a question of the power of the Post-Office Department to make this increase. They have reserved the right. Our contract says we shall be paid pro rata. I submit when they *in* increase that distance our pro rata is $96.93 per mile.

But we have got something more than that, the very records we introduced here show that the Department always, and in this case particularly, understand what that pro rata is. Then, again, beyond the statute in the contract, the contract says it is not in excess, and then provided for it absolutely.

The COURT. Why do they bind themself to pay at the pro rata; why should they? The statute does not require it.

Mr. DIXON. If your honor please, the statute don't prohibit it.
129 I don't think this court is going to say that because the statute don't prohibit, the proper officers of the Department have not the power to go up to that sum. They have a right under that statute to contract; the statute don't prohibit it; the statute don't say you shall not give the pro rata, it simply is prohibitory upon the power of the Department to give anything more. That section, 3960, says nothing about speed.

The COURT. You are at liberty to go before the jury upon all the circumstances relating to the making of this contract. I think it is clear enough that if the contract had been made by a person acting in his own right for the carriage of these mails, and afterwards parties had agreed upon such change as was here made, and the person contracting for the service proceeded to make settlement according to the terms of the contract, of the new agreement as made, that he could not afterwards complain of anything that was done under it, could not recover back any moneys paid under it. These men in the Department, acting in a representative capacity, if they assume to do a thing wilfully wrong, and the other parties also unite in that, the parties with whom the contract is made, it would seem to me that the Government may be entitled to sue for it and recover the amount which is overpaid. In that view I agree that it must appear to the jury that the officers of the Department, Brady and his clerks, were joined in the wrong, if any was committed; that the parties deliberately set about making this contract in this way so as to increase the amount be-

yond what could have been properly allowed for the service. In that view, if the jury so find, then the question comes to the point whether the contract was fraudulently made by the officers and by the contractors.

130 * * * * * * *

The COURT. The question is whether this contract was fraudulently made, this extension of service, in the way in which it was made, from Lake City to Ouray.

Mr. DOUGLASS. Then does your honor hold that our argument must be restricted to the question of fraud alone?

The COURT. Yes, sir.

Mr. DOUGLASS. That, of course, does not apply to the item of $1,300 allowed during the month of October?

The COURT. As to that item I am inclined to think that if the Department, having the power and authority to make the deduction from the service, and having received notice of the way in which mail was carried, failed to make it at the time, they are concluded by it.

To which ruling and opinion of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff, by its counsel, prayed and requested the court to instruct the jury as follows:

Instruction I. The law regulating extra and additional compensation for extra or additional service performed by mail contractors is found in sections 3960 and 3961 of the Revised Statutes.

Sec. 3960 provides as follows:

"SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service."

When it becomes necessary to add new service, as, for instance, by increasing the length of the route, this section expressly limits the

131 compensation which may be allowed for such additional service, and it absolutely precludes any loose guessing as to the amount of the additional service or the amount which may be allowed as compensation therefor. It limits it to an amount not exceeding the exact proportion which the original service bears to the original compensation, and if payments are made in excess of such exact proportion upon the strength of any erroneous guesses or estimates, then when the facts are ascertained it is made the duty of the Postmaster-General to cause suit to be brought to recover back the excess so paid, and for every dollar so received in excess the contractor is liable to the Government.

Instruction II. This provision of section 3960 is absolutely binding, and any allowance beyond it is illegal. In computing the compensation the whole original service must be considered, and in this case the compensation for any increase of service from Lake City to Ouray by way of Barnum should have been computed upon the basis of the entire route from Garland to Ouray as it originally existed, and not upon any mere fraction of the route, as from Lake City to Ouray. If the compensation upon such extra original route was $96.39 a mile, then no officer had any power to allow or pay any greater rate per mile for the increased service, and if any such additional allowance was made the same was illegal, and you should render a verdict for the amount so paid.

Instruction III. Section 3961 provides: "No extra allowance shall be

made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary,
132 and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

This section expressly limits the additional compensation which can be received by the contractor or paid by the Department for increase of speed. It limits such compensation strictly to an increase proportioned to the additional number of stock and carriers rendered necessary by the increase of speed; and if no additional stock and carriers are made necessary by the increase of speed, then the law forbids any increase of pay, and such allowance if paid can be sued for and recovered back.

This section is absolutely binding, and in this case should it appear that no additional stock and carriers were made necessary by fixing the time on this route from Lake City to Ouray at 36 hours, then any extra compensation was illegal. Or, in other words, if the defendants could have carried the mail by way of Barnum in 36 hours with 22 horses and 11 men, they were not entitled to a dollar of extra compensation, and the Government is entitled to recover the same if such was paid; or if the defendants required additional horses and carriers, but such were less than they represented, viz, 66 horses and 22 men, then all extra compensation received for horses and carriers not made necessary and not used can be recovered in this action, and you should render a verdict for the same.

Instruction IV. In addition to these sections, the law further provides, in section 4057, as follows:

133 "SEC. 4057. In all cases where money has been paid out of the funds of the Post-Office Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by mistake, collusion, or misconduct of any officer or other employee in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

This section is notice to all the world, and especially to mail contractors, that if payments are made to or received by them from the Post-Office Department in mistake of fact, or in excess of what the law allows, they are not only liable to be sued for the same, but it is the duty of the Postmaster-General to cause such suits to be brought. Every dollar of extra or additional compensation, therefore, received by a contractor in excess of the amount allowed by law, is received by him at his peril, and with the knowledge that he is liable to be called upon to refund the same at any time in a suit brought by the Government for its recovery.

Instruction V. If the jury believe from the evidence that the portion of the route in this case between Lake City and Ouray by way of Barnum was expedited, and extra compensation allowed therefor in the sum of $15,964.77 per annum upon the supposition that 66 horses and 22 men would be necessary to carry the mail over said portion of said

route upon a schedule of 36 hours, whereas in fact there was no increase whatever in the number of horses and men required above the number which the defendants, or either of them, swore were necessary to perform said service on a schedule of 72 hours, then the Government can recover every dollar so paid, for in that event it was all paid in violation of the law.

Instruction VI. In determining these questions you are to consider only the number of horses and men actually necessary to carry the mail, and you are to exclude from your consideration all horses and men which were employed, or which might have been employed or were rendered necessary in carrying passengers or express matter in the general stage business of the contractor. It is no purpose of the law to permit a contractor to secure double pay for freight and passengers under the guise of carrying the mail. You will therefore determine from the evidence how many horses and men were necessarily employed between Lake City and Ouray, by way of Barnum, in carrying the mail exclusively, or how many would have been necessary to carry the mail exclusively, without any reference to the freight or passenger business.

Or, in other words, if defendants could have carried the mail in a wagon drawn by two horses, and, by reason of their being carriers of passengers and freight, they were required to use four or six horses and a stage to carry their passengers and freight, they could not charge the expense of additional horses, vehicles, and carriers to the Government.

Instruction VII. In determining the amount of compensation which may be allowed for additional service, the character of both the
135 original and the additional service must of course be considered, including the speed at which the two services are performed and the character of the roads traveled, the condition of travel being an essential consideration.

If, therefore, the jury believe from the evidence that the original contract road from Lake City to Ouray over the mountain by way of Mineral Point was a very difficult road to travel, traversable in part by pack animals only, and for a large portion of the year impassable except by men on snow shoes, whilst the road from Lake City around by way of Barnum was a reasonably good mountain road, over which the mail could be carried at the speed adopted as easily as it could have been carried over the first route at the speed named in the contract, taking the whole year through, then the allowance for expedition was all in excess of the exact proportion which the original compensation bore to the original service, and it was all paid in violation of law, and can be recovered back, and should be included in your verdict.

Instruction VIII. If it appears from the evidence that during the month of October, 1878, the defendants only carried the mail or had it carried between Lake City and Ouray three times a week, and yet received pay for daily service, then the payments for the service not performed were made in violation of law, and may be recovered back, and should be included in your verdict, provided the defendants were not prevented from performing the daily service by natural obstacles which they could not overcome.

Instruction IX. The original contract in this case obliged the defendants to carry the mail from Garland to Ouray at an average speed of about

3.44 miles per hour, and at a compensation of $96.93 per mile per annum.

136 If therefore an additional service of 110 miles was added, at a less speed, and yet two and a-half times as much pay per mile was allowed and paid for the same, then such allowance was made and paid in violation of law, and no matter whether it was paid by the Government officials in fraud, or in mistake merely, every dollar so paid in excess of $96.93 per mile (or $10,663.26 per annum) can be recovered back, and it is your duty to render a verdict accordingly.

But the court refused to give all or any one of said instructions as prayed by the plaintiffs, to which ruling of the court in refusing to give all or any one of said instructions, the plaintiffs, by their counsel, then and there excepted.

And thereupon the court charged and instructed the jury as follows:

Charge to jury.

In the circuit court of the United States, December 18th, 1885.

THE UNITED STATES
vs.
BARLOW & SANDERSON.

HALLETT, J. (orally):

This contract, gentlemen, is dated March 15th, 1878, and provides for carrying the mail from Garland, by way of Fort Garland and other points, to Lake City, and thence by way of Sherman, Burrow's Park, Tellurium, and Animas Forks, to Ouray and back, seven times a week, from the first day of July, 1878, to and including the 30th day of June, 1882; and the contractor, Mr. Vorheis, was to receive $19,000 for this service.

137 That was at the rate, as stated by counsel, of $96.39 per mile for the entire distance. The entire distance was 196 miles. There is a schedule attached to the contract, in which the time is given. It was provided that mail should leave every day at 8 p. m.—leave Garland—and arrive at Lake City in 27 hours, and should be carried back from Lake City in the same time; and then it should leave Lake City at 1 a. m., daily, and arrive at Ouray in 30 hours, and be carried back in the same time.

Now, it is said, and the evidence tends to prove, that as to the part between Ouray and Lake City, it was found impracticable to carry the mail. In the summer time it could be carried with pack animals, but for several months, the greater part of the year, during the fall, winter, and spring, it could only be carried by men on snow shoes, and, perhaps, not at all part of the time. It may be said, upon the evidence, that it was ascertained that practically the contract could not be executed as to the part between Lake City and Ouray, not in the time provided in this contract, of thirty hours, which was a rate of speed of one and one-half miles per hour, about, nor in any time—it could not be done at all. So that, in the condition of things, we have a contract which was capable of being carried out, as far as Lake City, that is, between Garland and Lake City, and incapable of execution between Lake City and Ouray.

Now, in that state of affairs, it seems, I may remark, that some of the people residing at Ouray and elsewhere in that country, anxious to have a mail between Lake City and Ouray, applied to the Department to
138 have a change made in the route, so as to lay it upon an entirely different country, an entirely different line. Instead of going over the mountain, a distance of 46 miles, they were to go around the greater part of the mountain, a distance of 110 miles. And in that petition and application, such as they were, the petitioners proceeded upon the hypothesis that the contract could not be carried out in the way in which it was made, by carrying the mail by way of Mineral Point, over this great range of mountains; it must be carried in some other way, if at all.

Now, in that condition of things, they applied to the Department to make a change, and the officer of the Department, who was an assistant postmaster-general, I suppose, of some number—whether first or second or third or fourth I do not recall, but he assumed to proceed under this section of the Statute: "Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order and entered upon the books of the Department, and no compensation shall be paid for any additional regular servic rendered before the issuing of any such order."

The language of that section is very general: "Compensation for additional service in carrying the mail shall not be in excess," &c. It does not say what kind of service or in what way it shall be additional to the service already rendered; but it is to be observed that with reference to the matter which was presented for the consideration of the Post-
139 master-General, this was a service in substitution for something that could not be done. It may be said, in one sense, that it was additional to some service that the contractor was already rendering under this contract; but in respect to the particular thing to be accomplished by it, to get the mail from Lake City to Ouray, it was in substitution for it, it was an entirely new thing. But he proceeded under the authority of this statute, whatever it may be, and assumed that he could select a new line, not at all like the one which he was abandoning, and in which a service had been required at the rate of a mile and a half an hour. And it was his duty, under this statute, to require the same service upon this new route, although it was entirely different; the change was made expressly with a view to get a practicable route, to abandon the one that was impracticable, and to take one that would be practicable for wheeled vehicles. He assumed that he was to take the same time in carrying out this contract. In that he made a very great mistake. This statute authorized nothing of that kind. The time had been fixed with reference to the route over this great mountain, which was probably known to be exceedingly difficult, impossible during a considerable part of the year, the time had been fixed with reference to that, and to say that that should apply to another route, an entirely new one, different as to every foot of the way—there was not a single mile or yard of it that was the same as the route which was abandoned—to say that that was to go upon the same time was mere assumption. Whether he was authorized to order these contractors under this contract to proceed according to the rate of speed upon this

new route which had been fixed between Garland and Lake City, and which was about 5.92 miles per hour, very nearly 6 miles—150
140 miles in 27 hours—is very doubtful; but under the circumstances that is all that can be claimed under this contract, that he was authorized to proceed under this statute, and to require the service to be performed in the same way that it was performed upon the remainder of the route which was found to be practicable for wheeled vehicles; but in view of the circumstances that it had been thought nesessary in making this contract to divide the ground so as to get a very different rate of speed in one part, the part lying between Lake City and Ouray, from that which obtained between Garland and Lake City, it is very doubtful whether he could proceed at all, under this statute, or whether he could order the carriers to proceed from Lake City to Ouray by this new line at the same rate of speed which had been adopted from Garland to Lake City.

But I need not consider that. He did not do that, and what he did do he had no authority to do—to make the rate of speed a mile and a half an hour, around from Lake City to Ouray, on this new route. And so, also, to increase the speed upon the same basis was an act which he was not authorized to perform under the statute. Now I must say to you, in addition to this, that my understanding is that under the law and under the regulations of the Department, all contracts for mail service are to be let upon general bidding, by advertisement for a certain time in the papers, giving to all persons disposed to enter into such business an opportunity to bid for the contracts, and the contracts are let for four years, or something like that. The postmaster, when, for any reason, a contract becomes inoperative, if the contractor fails to perform it, or any difficulty arises in respect to the execution of it, *he* is authorized by the regulations to make a contract for temporary service.

141 At the time this contract was made, I believe that such contract was for a period of six months; he could make *it* for a period not exceeding six months; it seems that the time has been since extended to not exceeding one year, for which he may contract for temporary service. Aside from this temporary service, which is intended to fill a gap between the principal contracts, he must proceed according to law to advertise and let a contract by general bidding, by advertisement, and not otherwise. He has no authority to make a contract for a long time, such as this was. And I have to say to you, upon the statute and the regulations that were in existence at the time, that in my opinion the Postmaster-General was not authorized to make this contract in respect to carrying the mail from Lake City to Ouray in the way in which he did it. But it seems from the testimony that he made an agreement of this kind, and the parties went on and performed it, and have received money under it. Under such circumstances, although made without authority of law and in excess of all provisions of the statute and the regulations in respect to these matters, it is my judgment that the Government cannot recover any part of the consideration which these defendants have received for carrying the mail, unless, in the making of this contract, there was fraud, and in the circumstances of the case a fraud which was participated in, which was countenanced and recognized by the officer of the Department, the Postmaster-General, whether he was third, fourth, or fifth, whatever his number may be, and the defendants as well. And whether there was such fraud or not

is a question to be determined upon all the evidence before you. It is stated by the defendants themselves that none of the parties who were making this contract knew anything at all as to the nature of the
142 service to be preformed; and, nevertheless, they set about making a statement that a certain force would be required to carry the mail over this new route, as that, if it were to go in 72 hours, it would require 22 horses and 12 men, and if it was to go in 36 hours, as it was in fact carried, it would require sixty-six horses and 22 men. There is proof that no such force as that was required, or, at least, not nearly so much. Now, upon the evidence which is before you as to the manner of computing the amount which was to be paid for carrying this mail, and the force to be used in respect to it, you are to say whether these parties, in making an agreement of this kind, contemplated a fraud upon the Government, and by fraud I mean that there should be excessive pay for this service. It seems that the amount to be paid was $26,658 per annum, and it was raised to this point upon some estimate, I don't know precisely how, some estimate as to the cost of the service, which was based upon these figures, which were put into the office of the Postmaster-General by Mr. Sanderson, and apparently acted upon by him. In general, I suppose, over an ordinary road, it must be known by men in this business what force is required to carry a mail of ordinary weight in such a country as that, the number of horses, and what number of buckboards or coaches, what number of men; in other words, the cost of carrying it, it seems to me, must be pretty clear to persons who are familiar with the service. Now if, upon all that took place there at the office of the Postmaster-General you are of the opinion that these parties combined and agreed to raise the compensation to an extraordinary figure with a view to benefit the defendants, knowing that the compensation was excessive, then I think the Government may sue for it and recover it back.

143 If they were acting honestly and fairly and in the belief that they were dealing fairly with each other, that this was a reasonable compensation for the service to be performed, there can be no recovery, and this without reference to what the service actually cost afterwards, and without reference to what the fact turned out to be with respect to the force required. The testimony as to the force actually used was given only to explain how the parties must have understood it at the time this contract was made, that is to say, persons familiar with this service; the Postmaster-General himself, or the men in his office, must have known something about what force was required to carry mail 110 miles, letting as many mail contracts as they do; certainly the defendants knew all about it, and if they stated the force in excess of what the service actually required, for the purpose of getting an extraordinary compensation, and there was an intention on their part at that time, and an intention on the part of the officer letting the contract that they should have extraordinary compensation for this service, then the Government may recover. That is the question for your consideration, gentlemen.

There are one or two instructions here asked on behalf of the defendants, which I will give as follows:

"Fraud, in transactions of this nature, is never presumed. The presumption of innocence prevails until the contrary is proved by a fair and reasonable preponderance of the evidence. In such cases, also, the pre-

sumption is in favor of the innocence and integrity of the action of the public officers; the acts of the Postmaster-General and of his as-
144 sistants, coming within the scope of their powers, are presumed to be honest and fair until the contrary is established by a preponderance of proof."

In this case the presumption is the orders in question were honestly and properly made; that is not a subject which you are to consider. I advise you the Postmaster-General had no authority to make such orders as he did make; but as to the intention of the parties in the premises, that of the defendants also, the presumption is that they were acting fairly and honestly, unless that be overcome by the evidence. If the circumstances are such as to convince you that they were not so acting, that there was an intention on the part of these parties to get an excessive price from the Government for this service, and this was carried into the contract, then the plaintiff may recover; otherwise not.

And thereupon the plaintiffs by their counsel then and there excepted to so much of the said charge as is hereafter specifically set forth, to-wit:

"But it seems from the testimony that he made an agreement of this kind and the parties went on and performed it and have received money under it. Under such circumstances, although made without authority of law and in excess of all provisions of the statute and the regulations in respect to these matters, it is my judgment that the Government cannot recover any part of the consideration which these defendants have received for carrying the mail unless, in the making of this contract, there was fraud, and in the circumstances of the case a fraud which was participated in, which was countenanced and recognized by the officer of the
145 Department, this Postmaster-General, whether he was third, fourth, or fifth, whatever his number may be, and the defendants as well."

And also to the following:

"Now, if, upon all that took place there at the office of the Postmaster-General, you are of the opinion that these parties combined and agreed to raise the compensation to an extraordinary figure, with a view to benefit the defendants, knowing that the compensation was excessive, then I think the Government may sue for it and recover it back. If they were acting honestly and fairly, and in the belief that they were dealing fairly with each other—that this was a reasonable compensation for the service to be performed—there can be no recovery, and this without reference to what the service actually cost afterwards, and without reference to what the fact turned out to be with respect to the force required."

And inasmuch as the matters and things aforesaid do not fully appear of record herein, the plaintiffs present this their bill of exceptions, and pray that the same may be signed and sealed by the judge of said court, and it is done accordingly, this 8th day of March, A. D. 1886.

(S'g'd) MOSES HALLETT, [SEAL.]
Judge.

(Endorsed:) U. S. circuit court, district of Colorado, 1863; *The United States* vs. *Bradley Barlow & J. L. Sanderson:* bill of exceptions; filed Mar. 9, 1886. (S'g'd) Edward L. Bishop, clerk.

146 And afterwards, and on, to wit, the 6th day of April, A. D. 1886, came again the said plaintiff, by its attorney aforesaid, and sued out of said court a writ of error to the Supreme Court of the United States.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of error.

147 Writ of error to circuit court U. S. District Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between the United States of America and Bradley Barlow and J. L. Sanderson, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, sitting at Washington, D. C., together with this writ, so that you have the same at the said court on the eleventh day of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of April, in the year of our Lord one thousand eight hundred and six, and of the Independence of the United States the 110 year.

[SEAL.] EDWARD F. BISHOP,
Clerk.

Allowed by
[SEAL.] MOSES HALLETT,
Judge.

148 And thereupon a citation was issued, duly served upon the said defendants, and returned and filed in said court and in said cause. And the said citation is next hereto attached, to wit:

Citation.

149 THE UNITED STATES OF AMERICA,
District of Colorado, ss:

The United States of America to Bradley Barlow and J. L. Sanderson greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D.

C., on the eleventh day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein the United States of America is defendants in error, to show cause, if any there be, why the judgment rendered against the said plaitniff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, district judge of the circuit court of the United States for the district of Colorado, this 6th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

MOSES HALLETT,
Judge.

149½ *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this 8th day of April, A. D. 1886, personally appeared Elmer E. Parlin before me, the subscriber, a clerk of the district court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to L. S. Dixon, esq., attorney of the said defendants in error.

ELMER E. PARLIN.

Sworn to and subscribed before me this 8th day of April, A. D. 1886.

EDWARD F. BISHOP,
Clerk District Court U. S.

(Indorsed:) Gen. No. 1663. Circuit court of the United States, district of Colorado. The United States of America, plaintiff in error, vs. Bradley Barlow & J. L. Sanderson, defendants in error. Citation. Filed in circuit court of the U. S. this 8' day of April, A. D., 1886. Edward F. Bishop, clerk. H. W. Hobson, attorney for plaintiff in error.

150 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court, and in a certain cause lately in said court pending, wherein The United States of America was plaintiff, and Bradley Barlow and J. L. Sanderson were defendants, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 15th day of April, A. D. 1886.

EDWARD F. BISHOP,
Clerk.

Cost of transcript:

440 folios, at 10c	44 00
Certif. & seal	35
	$44 35

(Indorsed on cover:) No. 899. The United States, plaintiff in error, vs. Bradley Barlow and J. L. Sanderson, Colorado C. C., U. S. Filed May 10, 1886.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered, that heretofore and on, to wit, the twenty-seventh day of October, A. D. 1886, the same being a day in vacation preceding the November term, A. D. 1886, of said court, came Henry W. Hobson, esq., attorney for the United States, in a certain cause lately pending in said court, wherein the United States of America was plaintiff and Bradley Barlow and J. L. Sanderson were defendants, and filed in said court and in said cause its assignment of errors.

And said assignment of errors is in words and figures as follows, to wit:

Assignment of errors.

In the United States circuit court for the district of Colorado.

THE UNITED STATES, PLAINTIFF, *vs.* BRADLEY BARLOW AND J. L. SANDERSON, defendants.	No. 1663. Oct. term, 1885.

Assignment of errors.

Plaintiff says there is error in the record and proceedings herein, in this, to wit:

1. The court erred in its charge to the jury on the trial of said action in the matters excepted to by the plaintiff, and set forth in the plaintiff's bill of exceptions.

2 2. The court erred in refusing to give each and all of the instructions asked for by the plaintiff and set forth in said bill of exceptions.

3. The court erred in the admission of evidence on behalf of said defendants, and in overruling plaintiff's objections thereto, as set forth in said bill of exceptions.

4. The court erred in refusing to admit evidence offered by the plaintiff, as set forth with plaintiff's exceptions thereto in said bill of exceptions.

(Signed) HENRY W. HOBSON,
United States District Att'y for Colorado,
By GEO. L. DOUGLASS,
Special Assistant Att'y.

(Endorsed:) U. S. circuit court, October term, 1885. No. 1663. The United States vs. Bradley Barlow and J. L. Sanderson. Assignment of errors. Filed Oct. 27, 1886. (Signed) Edward F. Bishop, clerk.

And endorsed upon said assignment of errors was a stipulation by the respective attorneys of the parties to this cause for the filing of said paper.

And the said stipulation is in words and figures as follows, to wit:

3 *Stipulation for filing the assignment of errors.*

It is hereby stipulated and agreed that this assignment of errors may be filed nunc pro tunc as of the October term, 1885, and that a certified

copy thereof may be filed with and taken as a part of the record of said case in the Supreme Court.

(Signed) PITKIN & RICHMOND,
Att'ys for Defendants.

(Signed) HENRY W. HOBSON,
U. S. Att'y.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the assignment of errors and the stipulation for filing the same heretofore filed in said court, and in a certain cause lately in said court pending, wherein the United States of America was plaintiff and Bradley Barlow and J. L. Sanderson were defendants, as fully and completely as the same still remain on file in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 27th day of October, A. D. 1886.

[SEAL.] EDWARD F. BISHOP,
Clerk,

By F. W. TUPPER,
Deputy Clerk.

4 (Indorsed:) Supreme Court U. S., 1886. Oct. term. No. 899. The United States, pl'ff in error, vs. Bradley Barlow and J. L. Sanderson. Certified copy of assignment of errors.

(Stamped:) Office Supreme Court U. S. Filed Nov. 4, 1886. James H. McKenney, clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, PLAINTIFF in error,
vs.
BRADLEY BARLOW ET AL., DEFENDANTS in error.

No. 899.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, PLAINTIFF in error,
vs.
BRADLEY BARLOW ET AL., DEFENDANTS in error.
No. 899.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION TO ADVANCE.

Comes the Attorney-General of the United States, and shows to the court that this is one of many cases instituted and now pending on behalf of the Government to recover moneys illegally paid on what are known and called *Star-route* contracts; that in this suit the sum of $60,000 and more is involved; over twenty cases of this kind are pending in the district courts in certain States and in the Court of Claims, and together they involve more than a million of dollars. They are being prosecuted at enormous expense by the Government, and the difficul-

ties of procuring testimony are being daily increased. The questions here presented as to the construction of certain contracts and the right of the Government to recover are involved in all the cases, and the strong probability is the decision in this cause will determine the rest of this class or series of cases. While the ruling in this case in the court below is adverse to the Government, yet in two cases of like character in the district court of Kansas (26 Fed. Rep., 908 *et seq.*), the decisions were different, and these two cases are on appeal, but stand on appeal to await the final determination of this case.

Wherefore he moves the court to advance this cause on the docket for as early a day as may be consistent with the proper dispatch of the business of the court.

A. H. GARLAND,
Attorney-General.

Office Supreme Court U. S.
FILED,
OCT 11 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF in error,
vs.
BRADLEY BARLOW AND J. L. Sanderson.
} No. 268.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, PLAINTIFF in error,
vs.
BRADLEY BARLOW AND J. L. Sanderson.
No. 268.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

This is an action for money had and received by the defendants to the plaintiff's use, being money alleged to have been illegally and fraudulently received by the defendants as sub-contractors for carrying the mail.

The facts upon which the plaintiff's demand arose are as follows:

On the 15th March, 1878, one Luke Voorhees made a contract with the Postmaster-General to

carry the mail on route No. 38146, from Garland, Colorado, by Fort Garland, Wayside, Del Norte, South Fork, Wagon Wheel Gap, Antelope Springs, Lake City, Sherman, Burrows' Park, Telurium, and Animas Forks, to Ouray, in that State, and back, seven times a week, at $19,000 a year, "for and during the term beginning July first, eighteen hundred and seventy-eight, and ending June thirtieth, eighteen hundred and eighty-two." (See Contract, Rec., pp. 19–22.)

On the 28th September, 1878, Luke Voorhees made a subcontract with the defendants Barlow & Sanderson, by which they undertook and agreed to fulfill and carry out the principal contract, and by which Voorhees appointed and directed that all money earned from the Government should be paid to the subcontractors, who were duly recognized and accepted in that character by the Post-Office Department. (See subcontract, Rec. pp. 60–1.)

The distance between Lake City and Ouray by the old route is 46 miles, and the schedule running time for that distance was thirty hours by

the contract, or about a mile and a half an hour, whereas the schedule running time between Garland and Lake City, a distance of 150 miles, was twenty-seven hours, or 5.55 miles an hour, the difference in running time being due, no doubt, to the difference in the nature of the country through which the two parts of the route led. In fact the country along that part of the route from Lake City to Ouray, lying between Mineral Point and Ouray, being a distance of 10 miles, was almost impracticable, and was abandoned in October, 1878, for a route making a detour of 110 miles via a place called Barnum and following a road easily traveled with vehicles.

It is out of the orders of the Post-Office Department making this change in the route defined in the contract that this litigation has arisen. These orders will be found set out in the bill of exceptions (Rec., p. 43).

The record shows (pp. 57–60) that the difficulties and delays in carrying the mail from Mineral Point to Ouray had caused much dissatisfaction in the latter place, that a change in the mail route had been urgently called for, and that the call

was met by the order establishing the route via Barnum.

The result of the orders and amendments of orders made was that the defendants were allowed $10,663.26 per annum for the new service of 110 miles, that being according to the rate of the compensation fixed by the contract, namely, $96.39 per mile per annum, or $19,000 per annum for 196 miles of service.

As we have seen, the schedule time, fixed by the contract, for the performance of the service between Lake City and Ouray, a distance of 46 miles, was thirty hours, and at the rate of 1.53 miles per hour only, owing to the great difficulty of getting over the 10 miles between Mineral Point and Ouray. But when it came to making a schedule of running time for the new and circuitous route of 110 miles, which lay over a practicable country, and was, in good part, an old road, and all the way easily traveled with vehicles, the schedule time of a mile and a half an hour of the old and difficult route was hypothetically adopted, making the running time for the 110 miles seventy-two hours, *over a comparatively good road.*

This, of course, rendered necessary an order for the expedition of the intolerably slow service contemplated by the hypothetical schedule, which order was accordingly made upon the basis of an affidavit by the defendant Sanderson, who on the 30th September, 1878, *the day before the new route was established,* made oath to a letter addressed to Thomas J. Brady, Second Assistant Postmaster-General, stating that, "To perform the service on route No. 83146, between Lake City and Ouray, *on the present schedule* of seventy-two hours, requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require sixty-six horses and twenty-two men" (Rec., p. 17.)

To accomplish this expedition required, it was pretended, an additional pro rata compensation of $15,994.77 over and above the $10,663.26 according to the contract rate as applied to the 110 miles of new route, and then even the running time *fell below the average of* 3.44 *miles per hour under the contract,* while the similar service performed between Garland and Lake City at the rate of 5.55 miles per hour was performed at the

contract price of $96.39 per mile per annum over a road like that between Lake City and Ouray via Barnum.

As is already to be inferred, the estimate of the defendants as to the number of men and horses necessary to give the required expedition on the new route of 110 miles on which the Department acted was grossly excessive, it being admitted by the defendants that no such force of men and horses was used by them, and, what is more, that they went on through the whole term of the contract receiving compensation on the false and exaggerated estimate of the 30th September, 1878. (R., p. 62.)

It is, furthermore, claimed that the defendants received compensation for ordinary service under the contract, when in fact they had failed to render that service.

THE COMPLAINT (pp. 13–17).

The amended complaint, which superseded the original complaint, contains three counts, as follows:

(1) The first count, which resembles the common-law count for money had and received, de-

mands $99,580.21, with interest, as so much money had and received by the defendants to the use of the plaintiff.

(2) The second count, after setting out the facts substantially as above, avers that so much of the order of 1st October, 1878, as authorized an additional allowance of $15,994.77 per annum for expedition of service on the route of 110 miles was made solely on the basis of Sanderson's letter of 30th September, 1878, and that the sum so allowed was from time to time paid to the defendants.

It is also averred that the statements in said letter were false, and that the fact was, that no additional men or horses were required or employed in said service by reason of the expedition of the schedule of running time between Lake City and Ouray.

The complaint then alleges that the amount they paid for pretended expedition, namely, $59,592.98, was paid under a mistake of fact, and in violation of section 3961, Revised Statutes of the United States. It is also claimed that what was paid as pro rata compensation under

the contract for the 110 miles unexpedited service was not earned, and is therefore recoverable, and so demanded.

(3) The third count is largely a repetition of the second. After setting out the facts as above given, it avers that the rate of compensation under the contract was $96.30 per mile per annum for an average speed of 3.44 miles per hour over the whole route, and that for the 110-mile service the defendants were entitled to be paid at the contract rate of $96.39 per mile per annum at a speed not exceeding the average speed of 3.44 miles per hour.

The complaint then states, as above, the impracticable character of the 10 miles from Mineral Point to Ouray; that it was traversable only by pack animals, and that for this reason the running time was placed at thirty hours, or 1.53 miles per hour; that the added service of 110 miles was over a good practicable road, upon which defendants ran stages and other vehicles and transported freight and passengers, and which was as well adapted to the average rate of speed fixed by the contract as the road from Garland to Lake

City was adapted to the rate of speed fixed for that portion of the line.

It then avers that the service on the additional 110 miles was not performed at a speed equal to the average speed of 3.44 miles per hour under the contract, and, consequently, that the sum of $15,994.77 was in excess of the exact proportion which the original compensation under the contract bore to the original service, and that the whole sum so paid was paid to and received by the defendants in violation of section 3960 of the Revised Statutes.

THE ANSWER (pp. 27–32).

(1) To the first count defendants answer that they were never indebted in the amount demanded.

(2) To the second count they answer that the order of 1st October, 1878, was not made solely upon Sanderson's sworn statement of 30th September, 1878, and that the additional allowance made in said order was not paid "as in said second cause of action is alleged;" and they deny that the said statement was false in the particulars

and respects in the second count mentioned to the knowledge of defendants or either of them.

They aver that seventy-two hours was the true schedule for the 110 miles between Lake City and Ouray, as provided in the contract; that the estimate of sixty-six horses and twenty-two men was a mere estimate, made by Sanderson at the request of the Postmaster-General, and not an allegation of any existing facts in relation to the men and horses over a changed and increased route, "which did not then in fact exist;" that at the time said estimate was made the route from Lake City to Ouray via Barnum was merely contemplated, as was well known to the Postmaster-General and his subordinates and assistants.

That the estimate was honestly and truthfully made and not intended to deceive; and that, in fact, the employment of additional men and horses in more than three times the number previously and then necessarily employed in performing, and which would have been required to perform, the same service upon the schedule of seventy-two hours under the contract, was

made necessary in order to perform the additional service over 110 miles on the schedule of thirty-six hours.

They deny the averment in the complaint that no additional men or horses were required or actually employed by reason of the expedition of the schedule between Lake City and Ouray.

Defendants deny that any false allegations were used to induce said payments, or that said payments were made under mistake of fact, or were received by them in violation of said section 3691, Revised Statutes.

Defendants aver that they fully performed the whole additional service of 110 miles and fully earned the pro rata amount fixed as compensation for said service.

(3) As to the third count, defendants say that the rate of compensation per mile under the contract was $96.93 instead of $96.39, as alleged in the complaint, but that the contract did not provide for an average speed of 3.44 miles an hour over the whole route from Garland to Ouray, but for a specific speed of something more than 5½

miles per hour from Garland to Lake City and 1.53 miles per hour from Lake City to Ouray.

They say that they were entitled to $96.93 per annum for each additional mile at a speed not exceeding 1.53 miles per hour. They admit the impracticable character of the route from Mineral Point to Ouray, and deny that the road by way of Barnum was good and one over which defendants ran or could run stages or other vehicles and transported or could transport freight or passengers during the larger part of the time specified in said orders of the Postmaster-General; and they deny that said road was as well adapted to the average rate of speed under the contract as was the road from Garland to Lake City to the rate of speed fixed for that portion of the line.

They deny the averment that the additional service from Lake City to Ouray was never performed, but say that the same was well and faithfully performed.

They deny that the sum allowed for speeding the schedule was in excess of the exact proportion which the original compensation under the

contract bore to the original service, and deny that any sum was received by them in violation of section 3960 Revised Statutes, or any other law.

REPLICATION (pp. 32-33).

The plaintiffs deny that the schedule of seventy-two hours was the true schedule of time for the 110-mile service via Barnum, and aver that that schedule was made on false and fraudulent representations, as stated in the amended complaint.

Plaintiff denies that the estimate of 30th September, 1878, submitted by Sanderson, was made at the request of the Postmaster-General, and avers that the same was made and submitted to defraud the Government, and that the change of route was brought about entirely by defendant Sanderson, and that the Postmaster-General was not acquainted with the facts and acted on a mistake.

Plaintiff denies that there was any increase of the number of men and horses over and above what would have sufficed to perform the service under the 72-hour schedule.

It is also denied that the route from Garland to Ouray was divided up as to time, as alleged in the answer, but that defendants could only claim compensation for "the average speed for the total time between Garland and Ouray."

The case was tried at the October term, 1885, and on the 18th December a verdict was rendered for the defendants.

The plaintiff's counsel asked the court to grant a series of instructions (pp. 70–73), which were based on the fundamental contention of the suit, namely, that the defendants, having received compensation as for services which they had never rendered, as was admitted by them (p. 62), were in law bound to return the money so received, but the court refused to grant the instructions, or any of them; to which several rulings the plaintiff excepted (p. 73).

The court, in place of granting the instructions asked by the plaintiff, told the jury that there could be no recovery unless they were satisfied that there was a fraudulent combination to cheat the Government between the officers of

the Post-Office Department and the defendants (pp. 73–77).

On the 8th January, 1886, judgment for the defendants was entered on the verdict (p. 37).

ASSIGNMENTS OF ERROR.

It is submitted that the judgment is erroneous in this, that the learned court below rejected the nine instructions asked by the plaintiff, that is to say,

I. That under section 3960, Revised Statutes, the proportion of any allowance for additional service to such service must not exceed the exact proportion of the original compensation to the original service, and that if there be any such excess it may be recovered back by the Government.

II. That the rate of compensation fixed by the contract was $96.39 a mile, and that there was no authority to pay for the additional service at any greater rate.

III. That under section 3691, R. S., there could be no allowance for increased speed if no additional stock or carriers were required, and that if defendants received compensation as for 66 horses and 22 men when they did not employ that many the Government was entitled to recover the excess.

IV. That under section 4057, R. S., the action lay to recover whatever the defendants had received in excess of what the contract and the law allowed.

V. That if the allowance of $15,964.77 per annum for expediting that part of the route between Lake City and Ouray via Barnum was made on the supposition that 66 horses and 22 men would be necessary under a schedule for 36 hours, and there was, in fact, no increase of the number of men or horses above what the defendants swore was required under a schedule of 72 hours, then the plaintiff was entitled to recover the whole sum of $15,964.77.

VI. That in determining the questions in issue the jury could consider only the number of horses actually necessary to carry the mail entirely irrespective of the number of men or horses required by the defendants as carriers of passengers and freight.

VII. That if the mail could be carried as easily, at the speed adopted, over the road from Lake City to Ouray via Barnum as it was carried over the difficult and almost impassable road between Lake City and Ouray via Mineral Point, then the allowance made for expedition was in excess of the exact proportion between the original compensation and the original service and could be recovered back.

VIII. That if it appears from the evidence that during the month of October, 1878, the defendants only carried the mail between Lake City and Ouray three times a week and yet received pay for carrying it daily, the payments for the service not performed might be recovered back "provided defendants were not prevented from performing the daily service by natural obstacles which they could not overcome."

IX. That defendants were bound by the contract to carry the mail at an average speed of 3.44 miles per hour, and at a compensation of $96.93 per annum, and that if an additional service of 110 miles was added at a less speed than 3.44 miles per hour, and yet at an allowance and payment of two and a half times as much per mile as was demandable under the original contract, then such allowance and payment were in violation of law, and may be recovered whether paid in fraud or in mistake merely.

And it is furthermore assigned as error in the said judgment that the learned court below, in the room of giving the instructions asked by the plaintiff, instructed the jury, amongst other things, in the following words, that is to say:

X. But it seems from the testimony that he [the Postmaster-General] made an agreement of this kind and the parties went on and performed it and have received money under it. Under such circumstances, although made without authority of law and in excess of all provisions of the statute and the regulations in respect to these matters, it is my judgment that the Government can not recover any part of the consideration which these defendants have received for carrying the mail unless, in the making of this contract, there was fraud, and in the circumstances of the case a fraud which was participated in, and which was countenanced and recognized by the officer of the Department, this Postmaster-General, whether he was third, fourth, or fifth, whatever his number may be, and the defendants as well.

* * * * * *

> Now, if, upon all that took place there at the office of the Postmaster-General, you are of the opinion that these parties combined and agreed to raise the compensation to an extraordinary figure, with a view to benefit the defendants, knowing that the compensation was excessive, then I think the Government may sue for it and recover it back. If they were acting honestly and fairly, and in the belief that they were dealing fairly with each other—that this was a reasonable compensation for the service to be performed—there can be no recovery, and this without reference to what the service actually cost afterwards, and without reference to what the fact turned out to be with respect to the force required (p. 77).

Other rulings were made against the plaintiff and duly excepted to. They relate to the admissibility of evidence, and are unimportant if the theory of the case adopted by the court below should be adjudged sound; and, if it should be adjudged unsound, the questions presented by these rulings are not of a character to occur again, necessarily, or to have an important bearing on the matters in controversy. It does not seem probable, therefore, that this court will, in any event, pass on them; so we shall not stop to discuss them.

THE ARGUMENT.

Notwithstanding Congress has declared that "compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to

the original service" (R. S., § 3960), and that "*no extra allowance shall be made* for any increase of expedition in carrying the mail *unless thereby the employment of additional stock and carriers* is made necessary" (R. S., § 3961), and that money improperly paid "out of the funds of the Post-Office Department" may be recovered from the parties who received it, with interest, whether paid by fraud or mistake (R. S., § 4057), and notwithstanding evidence and the admissions of the defendants to show that they had received money from the Post-Office Department for services they had not rendered, contrary to sections 3960 and 3961, the learned judge instructed the jury that the Government could not recover in this action unless the jury should believe that there was a fraudulent conspiracy between the defendants and the officials of the Post-Office Department with whom they had their transactions.

One of the defendants expressly admits that he received pay for services he does not pretend to have rendered (Sanderson's depo., p. 62), and the testimony of the other defendant can only be

understood upon the hypothesis of a similar admission on his part (Barlow's depo., p. 63); indeed, the whole defense boldly proceeds on the ground that the defendants had secured a contract with the Government under which they could lawfully receive, and did lawfully receive, money for services they had never rendered, *and that it would be a violation of their contract rights to allow the Government to recover that money from them;* but, in the face of all this, the learned judge told the jury that the Government was completely *estopped* by the contract its officials had made with the defendants, provided they made it in good faith.

This is somewhat startling when we reflect that the Government under which we live is, as this court has said, an "abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or, more properly, officers;" that all its power "is delegated, and is defined by law, constitutional or statutory;" that "to one or both of these sources we must resort in every

instance;" that "we have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority" (The Floyd Acceptances, 7 Wall., 676); that "the Government does not guaranty the integrity of its officers nor the validity of their acts;" that "they are but the servants of the law, and if they depart from its requirements the Government is not bound," and that "there would be *a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it.*" (Moffat *v.* United States, 112 U. S., 24, 31.)

If, however, there are, as the learned judge of the court below held, officers in the Post Office Department who are above the laws they are put there to execute, and who can, by their improvident and useless contracts, so tie the hands of the United States as to compel it to submit to be pillaged by unscrupulous mail contractors claiming the contract right to receive the public money without any pretense of an equivalent, the sooner the country knows the fact the better.

If, as was laid down in this case, an officer, professing to act under a law that prohibits extra allowance of pay "for any increase of expedition in carrying the mail *unless thereby the employment of additional stock and carriers is made necessary*," can by a contract for "increase of expedition" estop the United States to set up the fact that such increase of expedition did not require any "additional stock and carriers," or at least did not require the increase of them called for by the contract, then it would seem that what has been laid down on this subject by this court, perhaps, needs some qualification.

Even in the case of negotiable contracts, the rule that the officer making them must have had authority to bind the Government by that form of contract before the incidents of negotiability can attach, is rigorously adhered to. (The Floyd acceptances, 7 Wall., 676; Cook *v.* U. S., 91 U. S., 389.)

How then can the law laid down in the court below be made to agree with the decisions of this court?

If Mr. Brady, the Assistant Postmaster-General, could bind the Government to pay the defendants for the use of sixty-six horses and twenty-two men, when, in fact, no such number of men or horses was used, then he might have bound the Government to pay for a larger number still if it appeared that he did so in good faith.

But the statute is explicit that for increase of expedition no extra allowance shall be made "*unless thereby the employment of additional stock and carriers is made necessary*" (R. S., § 3961), that is to say, that there can, in no case, be pay for expedition except where an equivalent service is rendered.

It is submitted that it can make no difference that Sanderson, one of the defendants, was applied to by the Post-Office Department to make an estimate of the additional men and horses he thought it would take to carry the mail in 36 hours from Lake City to Ouray *via* Barnum, and that he estimated it would take 66 horses and 22 men, without, as he says, knowing the character of the proposed new route. In other words, the defendants' case is, that Sanderson, here in Wash-

ington, submitted a haphazard estimate to Assistant Postmaster-General Brady with reference to the cost of expedition of service over a new route, which Brady was unacquainted with, and which he knew *Sanderson was also unacquainted with*, and that upon this rough guess as to the additional men and horses that would be required Brady made the order for expedition which, it is contended by the defendants, binds the Government to pay for expedition *not according to the actual service, but according to the exaggerated estimate* submitted by Sanderson, who says, in his deposition (p. 62), that he "*never corrected his estimate of* 66 *horses and* 22 *men upon which he was drawing pay, but,* THOUGH NOT USING SUCH NUMBER, *continued to draw pay from the Government therefor.*"

Up to this point we have assumed that the order touching the expedition of service under the contract was characterized by good faith; but it seems to us that Sanderson's letter or affidavit to Brady and the latter's action thereon are well calculated to excite the unpleasant suspicion that this is one of the transactions the discovery of which brought so much discredit on the pub-

lic service a few years ago. Here is the letter, the italics being our own:

WASHINGTON, *Sept.* 30, 1878.

Hon. THOS. J. BRADY,
Second Asst. Postmaster-General:

SIR: To perform the service on route No. 38146, between Lake City and Onray, *on the present schedule* of seventy-two hours, *requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require* (66) *sixty-six horses and twenty-two men.*

(Signed) J. L. SANDERSON.

Subscribed and sworn to before me this 30th day of September, 1878.

(Signed) J. H. HERRON,
Notary Public.

Now, when it is remembered that the route mentioned in this letter was only projected and had never been tried, we confess our inability to understand why Sanderson should have spoken of it *as a route in actual operation* and represented as actually occurring fact what, he now says, was no more than guess-work on his part; or why Brady should have made the basis of his official action this letter of Sanderson's which Brady knew was false in so far as it stated as actual fact what was no more than Sanderson's conjecture, if the transaction, *as it really took place*, had been one that could stand the light of day. It is hardly supposable that a correct transaction would have occurred in that way.

But the case was put to the jury in a way somewhat calculated to disarm suspicion as to the rectitude of the transaction from the false appearance given to it by Sanderson's letter.

The same ground was taken by the court below with reference to an overpayment to the defendants of some twelve or thirteen hundred dollars, that amount representing services which the defendant had failed to perform under the contract, and for which they had no right to receive compensation. The court told the jury that this money, thus improperly paid and received, could not be recovered back by the Government (p. 70).

Can there be a doubt that the money sued for is recoverable under section 4057, Revised Statutes, which is as follows:

> In all cases where money has been paid out of the funds of the Post-Office Department, *under the pretense that service had been performed therefor, when, in fact, such service has not been performed,* or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, *and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service,* the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon.

And it would appear to be equally clear that the money sued for is recoverable in the equitable

action for money had and received, which "in its spirit and objects has been correctly likened to a bill in equity," and "may in general be maintained whenever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff, which in equity and good conscience he ought to refund to him" (Lockwood *v.* Kelsea, 41 N. H., 187; Wiseman *v.* Lyman, 7 Mass., 288,9; Moore *v.* Mandlebaum, 8 Mich., 448; 1 Steph. N. P., p., [346]).

As Lord Mansfield said in Bize *v.* Dickson (1 T. R., 285), "where money is paid under a mistake, which there was no ground to claim, in conscience, the party may recover it back again by this kind of action" (*i. e.*, for money had and received).

In United States *v.* Cosgrove (22 Fed. Rep., 908), which arose on demurrer, and is a case like the one at bar, the court, taking the same view as that advanced by us, said, after quoting sections 3960, 3961, and 4057:

> The several provisions of the acts of Congress are public laws, and are binding on the Postmaster-General and all parties contracting with him. They must take notice of the powers conferred on him and the restrictions and limitations imposed. The law-making power may confer such authority and make

such limitations on the public officers of the Government as it deems proper, and a person entering into a contract with such officers must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. *The Floyd Acceptances*, 7 Wall., 667–680; *Curtis* v. *U. S.*, 2 Ct. Cl., 152; *Steele* v. *U. S.*, 113 U. S. 128; S. C., 5 Sup. Ct. Rep., 396; *People* v. *Fields*, 58 N. Y., 505; *Supervisors, etc.*, v. *Ellis*, 59 N. Y., 624. Admitting the facts as charged in this declaration to be true, does it set out transactions between the defendant and the Postmaster-General, and the payment of the public funds in pursuance thereof, unauthorized by law? It seems to me there can be but one answer to this question, and that in the affirmative. Section 3960 provides that "compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service. * * * And no compensation shall be paid for any additional regular service rendered before the issuing of such order."

It is charged that the orders of the Postmaster-General for the additional service, and payments made dependent therefor, violated the provisions of this section: (1) That the compensation paid was in excess of the proportion which the original compensation bore to the original service; (2) that the compensation was paid defendant for s rvices rendered before the issuing of the order to supply the Roswell office, to wit, from July 1st to October 24th; (3) that additional compensation was paid defendant for services (supplying the Roswell office) which he was bound to perform under his original contract, without extra compensation.

Section 3961 provides that "no extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

It is charged that to perform the original service on the schedule of seven and one-half days it required twelve carriers and thirty-six animals, and to shorten the running time to five days the defendant certified it would necessarily require nine additional carriers and fifty-two additional animals; and on this basis the additional compensation was allowed and paid defendant, whereas, in fact, no additional carriers or animals whatever were required or used by reason of such expedited service. It seems hardly possible that so great a cutting down of time could be done without requiring additional carriers and animals, or putting a great deal of extra work on those already employed, but the court can only accept the averment as made in the declaration, and this cer-

tainly charges a direct violation of the statute; and whether the money was paid on an intentional or unintentional misrepresentation of facts, or no representation at all, or by mistake or fraud, matters not. The money was paid in violation of law and for services never performed.

The only question remaining to be answered is, Can the United States maintain an action to recover it back? It seems to me the plain and unmistakable words of section 4057, before cited, answer this question fully and completely, and give such right of action. See also, *Steele* v. *U. S.*, 113 U. S., 134; S. C. 5 Sup. Ct. Rep., 396.

In the case of *U. S.* v. *Parker*, tried in this court last June, Judge Dundy, of Nebraska, took a similar view of the law as given in this opinion, while in the case of *U. S.* v. *Barlow*, *ante*, 903, tried in Colorado last December, Judge Hallett took the opposite view. The amount in controversy in any of these actions is sufficient to entitle it to a review in the Supreme Court, where the law will be finally settled.

But in Griffith *v.* United States (22 Ct. Cls., 165), the Court of Claims held that an adjustment of compensation by the Post-Office Department for expedition of service under a contract to carry the mail was binding on the United States to its full extent in a case where, in the actual performance of the service, the number of stock and carriers was less than the estimate called for, so that, notwithstanding the requirement of section 3961 that "*no extra allowance* shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary * * *," the court held the Government bound to pay for what it had never received.

The court proceeded on the ground that the Postmaster-General is invested by law with a large discretion as to the necessity for expedition and the amount of additional stock and carriers necessary to accomplish it, if any, and that the decision of that officer is necessarily final and can not be impeached collaterally, and decisions of this court are cited in support of the position.

But we submit, with great respect for that learned court, that the cases cited and the reasoning based on them do not seem to be applicable to a case like the one before it and like the case in hand, where the power of the Postmaster-General to make compensation for expedition is limited to the additional stock and carriers *made necessary*, which, however conjectural at first, at once becomes a matter of certainty when performance of the new service is entered on.

Where an officer's action depends on an actual fact, and not on his decision as to that fact, his power to act can only be shown by the existence of the jurisdictional fact. Thus, a probate judge who grants administration on the estate of a live person, whom he had adjudged to be dead upon

apparently credible evidence, has acted without jurisdiction, and what he has done is simply void. So Congress has said here that the Postmaster-General, in causing the expedition of mail service, shall not pay for any additional stock and carriers that are not necessary (S. 3961). How, then, can the Postmaster-General under such a law bind the United States to pay for stock and carriers not necessary, and shown to be not necessary by the actual performance of the service without them?

As the general principles discussed underlie all the assignments of error, it is unnecessary to discuss the latter in detail.

It is respectfully submitted that the judgment should be reversed for the reasons stated.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

REVISED STATUTES.

SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order.

SEC. 3961. *No extra allowance shall be made for any increase of expedition* in carrying the mail *unless thereby the employment of additional stock and carriers is made necessary*, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

SEC. 4057. In all cases where money has been paid out of the funds of the Post-Office

Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon.

Office Supreme Court U. S.
FILED.
OCT 16 1889
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES,
PLAINTIFF IN ERROR.
vs.
BRADLEY BARLOW AND J. L. SANDERSON.
No. 31.

In Error to the Circuit Court of the United States for the District of Colorado.

NATH'L WILSON,
SHELLABARGER & WILSON,
for Defendants.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES,
PLAINTIFF IN ERROR,
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In Error to the Circuit Court of the United States for the District of Colorado.

Brief for Defendants in Error.

STATEMENT OF THE CASE.

The writ of error in this case brings up for review a judgment entered for the defendants in error by the Circuit Court of the United States for the District of Colorado, in an action instituted by the United States, the plaintiff in error, to recover from the defendants in error $99,680.21, money "had and received by the defendants "to and for the use of the plaintiff."

The case was tried before a jury, and a verdict was rendered for the defendants.

Record, 35.

Exceptions were taken by the plaintiff to the refusal of the Court to give the instructions asked on its behalf, and to certain portions of the Court's charge to the jury, set forth in the plaintiff's bill of exceptions.

Record, 67–77.

The errors assigned by the plaintiff in error are that the Court erred in rejecting the nine instructions asked by the plaintiff and in giving the instructions definitely excepted to.

It appears from the Record that on the 15th of March, 1878, Luke Vorhees entered into a contract with the Postmaster-General for the transportation of the mails on Route No. 38,146, from Garland, Colorado, to Ouray and back, seven times a week, for a compensation of $19,000 per year for the term beginning July 1, 1878, and ending June 30, 1882.

Record, 39.

A map, or drawing, showing the terminal points of the route described in the contract, and the places through which it passed, is contained in the Record, between the 52d and 53d pages.

On the 28th of September, 1878, the defendants became sub-contractors under the contract of Vorhees, and were recognized as such by the Post-Office Department.

Record, 42, 60.

On the first of October, 1878, the Postmaster-General made the following order with reference to this route:

"(8600.) 1st. Omit service from Mineral Point to Ouray, "10 miles; reduce service four trips per week from Lake "City to Mineral Point, 36 miles; change service so as to "embrace Barnum, between Lake City and Ouray, increas- "ing distance 110 miles, and allow contractor $7,699.65 "per annum additional pay, being *pro rata* from October "1, 1878; allow contractor one month's extra pay on "service dispensed with.

"2d. Reduce schedule time from 72 hours to 36 hours "from Lake City to Barnum, 110 miles, and allow con- "tractor $15,994.77 per ann. additional pay, being *pro* "*rata* from October 1, 1878."

Record, 13.

And on the 22d and 23d of January, 1879, he made further orders relating to the same route as follows:

"JAN. 22, 1879.

"(673.) Amend order of October 1, 1878 (8600), so "as to pay sub-contractor in like amount."

Record, 13.

"JAN. 23, 1879.

"(710) 1st. Modify order of Oct. 1, 1878 (8600), so as "to omit service from Mineral Point to Ouray, 10 miles, "and deduct from contractor's pay $969.39 per ann., "being *pro rata*, and allow contractor one month's extra "pay on service dispensed with.

"2d. Reduce service four trips per week on 36 miles, "decreasing contractor's pay $1994.16 per ann., being "*pro rata*, and allow one month's extra pay on service "dispensed with.

"3d. Allow contractor $10,663.26 per ann. additional "pay, being *pro rata* for 110 miles increase in distance."

Record, 14.

The effect of these orders was to add 110 miles to the

length of the route from Garland to Ouray. That part of the route between Garland and Lake City was not thereby changed, but the contractors were required to carry the mails from Lake City to Ouray by a circuitous route, passing through a place called Barnum, designated on the map. The distance from Lake City to Ouray, by this circuitous route, was 110 miles, and the time for transporting the mails over this distance was fixed at 72 hours.

For this increased service the contractors were, by the orders referred to, entitled to receive $10,663.26 per annum additional pay.

The orders further provided that the schedule time on this route should be reduced from 72 to 36 hours, and the contractors paid the further sum of $15,994.77 for this expedited service.

From the time these orders were made until the contract expired, on the 1st day of July, 1882, the contractors transported the mails in compliance with the requirements of their contract as amended by the orders of the Postmaster-General.

The last payment for services under the contract was made to them on the 14th day of August, 1882.

On the 17th of December, 1884, the United States filed the original complaint in this case, claiming the right to recover of the defendants of the moneys so paid to them the sum of $59,592.98, as having been paid in mistake of fact, and in consequence of certain false allegations made by the defendants.

On the 13th of November, 1885, an amended complaint was filed, claiming the right to recover of the defendants the sum of $99,580.21, money paid and received in violation of law, in mistake of fact, and in consequence of the defendants' false allegations.

The averments in the amended complaint are, in sub-

stance, that the orders, hereinbefore quoted, were made solely upon the basis of a statement sworn to by one of the defendants, to the effect that twenty-two horses and eleven men were required to perform the service between Lake City and Ouray on the schedule then in force of seventy-two hours, and that to perform the same service on a schedule of thirty-six hours would require sixty-six horses and twenty-two men; that this statement was false and untrue, and was known to be so to the defendants, and was designed to mislead the Postmaster-General; that in fact no additional men or horses were required and none were actually employed by the defendants in performing said service; that by reason of the false allegations in said statement the Postmaster-General was induced to pay, and did pay, to the defendants, between the 1st day of October, 1878, and the 14th day of August, 1882, the sum of $59,592.98, in mistake of fact, as to the number of men and horses required or employed in said service, and that said sum was received by the defendants contrary to section 3961 of the Revised Statutes.

As a second cause of action it is alleged that the additional allowance to the defendants of $10,633.26 per annum for the additional service described in the orders referred to was made upon the understanding that said service was required and would be performed, and that the payments for said service, amounting to $39,987.23, were made upon the understanding and belief that said service had been performed, whereas said service had not been performed.

As a third cause of action it is alleged that the allowance by the Postmaster-General, by the order of October 1, 1878, of $15,994.77 per annum, in respect of the expedited service therein referred to, was unauthorized and unlawful, because in violation of section 3960 of the Revised

Statutes, which provides that the "compensation for ad-
" ditional service in carrying the mail shall not be in excess
" of the exact proportion which the original compensation
" bears to the original service."

In explanation of this averment it is alleged in the complaint that the entire length of the route from Garland to Ouray, as described in the original contract, was 196 miles; that the distance from Garland to Lake City was 150 miles, and the time allowed for carrying the mails that distance was 27 hours; that the distance from Lake City to Ouray was 46 miles, and the time allowed for carrying the mails that distance was 30 hours; and that, taking into consideration both parts of said routes and the time-schedule applicable to each, the compensation provided by the contract was at the rate of $96.39 per mile per annum for carrying the mail at an *average* speed of 3.44 miles per hour over the whole route; and that for the additional service of 110 miles required by the Postmaster-General's order on the route from Lake City to Ouray by way of Barnum, the compensation could not be lawfully made at any higher rate. But it is alleged that the Postmaster-General did fix a higher rate of pay for said service, and that he determined the compensation to be allowed by taking into consideration not the average rate of speed over the entire original route, but the rate of speed fixed by the contract for that part of the route lying between Lake City and Ouray, 46 miles in length. The compensation for that portion of the route was at the rate of $96.93 per mile per annum for each additional mile of service performed at a speed not exceeding 1.53 miles per hour, and this rate of compensation was applied to the 110 miles of additional service required by the order, and it is claimed that the entire amount so allowed and paid under this order, to wit, the sum of $53,592.98, is recoverable in this action,

as having been paid and received without authority or in violation of law.

Record, 13–17.

The complaint contains no allegation of any promise to pay the amount sought to be recovered.

The answer of the defendants denies that the plaintiff is entitled to recover the whole or any part of the amount claimed of them, and denies all the material averments of the complaint.

Record, 27–31.

The plaintiff offered in evidence the contract between the Postmaster-General and Vorhees, referred to in the complaint (R., 37), the sworn statement made by the defendant Sanderson as to the number of men and horses required for the additional service (R., 41), the orders made by the Postmaster-General, increasing and expediting the service (R., 43), and copies of the accounts, drafts, and orders showing the amounts paid to the defendants, the service performed, and the fines imposed.

Record, 44–52.

The plaintiff also offered testimony tending to prove the number of men and horses employed in carrying the mails from Barnum to Ouray from November, 1878, to February, 1879, and that eleven men and twenty-two horses would have been sufficient to perform the service from Lake City to Ouray, by way of Barnum, and that the road between Lake City and Ouray, by way of Mineral Point, was impassable for wheeled vehicles and traversable for a part of the year only by men on snow-shoes, while the road from Lake City to Ouray, by way of Barnum, was a very good one.

Record, 53–54.

On behalf of the defendants, evidence was offered tending to prove that at the time they became sub-contractors under the contract of Vorhees, September 28, 1878 (R., 61), the various objections that existed to the route from Lake City to Ouray, by way of Mineral Point, and the inconveniences to the inhabitants of Ouray and Hinsdale counties, caused by unavoidable interruptions of the mail service, were well known to the Post-Office Department, and had been previously under consideration.

A special agent of the Post-Office Department and the postmaster at Lake City had reported that the portion of the route between Lake City and Ouray, by way of Mineral Point, could not "possibly be served during eight "months of the year on account of natural difficulties to "be encountered, deep snows and difficult trails over the "mountains, unless by snow-shoe service."

They both recommended that the mail from Lake City, which was described as a very heavy one, should be carried to Ouray by way of Barnum, "a longer route, but "the most practicable for all seasons of the year."

Record, 59, 60.

On the 20th of September, 1878, a few days before the defendants entered into their sub-contract with the contractor, a petition had been filed in the Post-Office Department, signed by county officials of Ouray and Hinsdale counties, and endorsed and recommended by Senator H. M. Teller, Governor Routt, and others, stating that the route described in the contract "runs over exceedingly "high ranges of mountains, over which the mail can only "be carried on horseback at the most favorable season of "the year, and for about six months of the year it is im-"possible to take the mail over it in any way, greatly to "the detriment of all the business interests of Ouray

" county," and asking that daily service should be established from Lake City to Ouray *via* Cimaron and Las Pinas Agency, that is, by way of Barnum, a distance of 110 miles over a wagon road, on which the mails could be transported the year round.

This petition was forwarded to the Second Assistant Postmaster-General by Charles Adams, special agent for the Post-Office Department, with the following endorsement:

" I have always maintained that the daily service be-
" tween Lake City and Ouray, as at present established,
" will prove impracticable during eight months of the
" year, and can only repeat that if the service to Ouray
" is to be had during those months it will become neces-
" sary to change the route, as asked for in the within peti-
" tion, at once and before winter sets in."

Record, 58, 59.

On this petition the Second Assistant Postmaster-General made the following endorsement:

" TURNER: Is this a route? I invite proposals from
" contr's present."

On the 30th of September, 1878, the defendant, Sanderson, addressed a letter to the Second Assistant Postmaster-General, suggesting that in lieu of the temporary service ordered between Barnum and Ouray, the service be made by embracing Barnum on 38,146, Garland to Ouray, increasing distance 110 miles, * * * and expediting the schedule from the present at *pro rata* rate of 72 hours to 36 hours between Lake City and Ouray.

Record, 59, 60.

On the following day the order was issued referred to in the complaint.

The defendants were examined, and explained the circumstances under which the statement of the defendant, Sanderson, was made, and the orders issued referred to in the complaint.

The defendant, Sanderson, testified that when he made his statement to the Postmaster-General he had never been over the proposed new route; that the statement was made at the request of the officials of the Post-Office Department, and from data obtained from the maps, figures, and petitions in the Department; that his statement was merely an *estimate* of the number of men and horses required for the additional service, and was understood by the officers to be merely an estimate made up without personal knowledge of the facts therein stated; that when said estimate was made it was in accordance with his, Sanderson's, best judgment and belief, and was considered by him fair and reasonable, but that in view of the facts subsequently ascertained he, Sanderson, was satisfied that he had made a mistake in saying that 11 men and 22 horses were required for the 72-hour schedule; that up to July, 1880, less than 30 horses and 12 men were used on said route, and that in July, 1880, four-horse coaches were put on the route and about 50 horses and twenty-two men were thenceforward employed in said service.

He further testified that the service could have been performed on said route in 72 hours with 12 or 14 horses, and 6 or 7 men.

Record, 61, 62.

The defendant, Barlow, testified that the expedition of the service was not made at the request of the defendants, or either of them; that he was present when Sandersón's affidavit was made; that the Second Assistant Postmaster-General said that the Department desired to expedite the

schedule of time, and that the service would be paid for according to the increased cost of the service *pro rata* with the original contract; that the schedule of 72 hours, mentioned in the affidavit, was arrived at by the chief clerk in the Department by making a schedule in proportion to the original route from Lake City to Ouray, which was 30 hours for 46 miles, and which would make the schedule on the increased distance of 110 miles about 72 hours; that the chief clerk and the Second Assistant Postmaster-General fixed the schedule, and the contractors had nothing to do with fixing it.

Record, 64.

Nine instructions were asked on behalf of the plaintiff stating the contention that it was the duty of the jury to determine what stock and carriers were necessary for the performance of the service required, and what compensation was allowable by law therefor; and also that it was the duty of the jury to render a verdict for the plaintiff for all moneys paid to the defendants in respect of horses and carriers not found by them actually necessary in the performance of said service, and for all moneys paid to the defendants under or in consequence of mistake committed in allowing the contractors $10,663.26 per annum for increased service.

These views of the law applicable to the case did not meet the approval of the Court, and all the instructions were refused.

Record, 71, 72, 73.

The Court held that the Postmaster-General having made an agreement, and the agreement having been performed, and money received under it, the number of men and horses necessary for the performance or actually used was unim-

portant, and the Government could not recover any part of the money paid, unless taking into consideration the circumstances of the case, in the making of the contract there was fraud participated in, or countenanced, or recognized by the Postmaster-General or the officers of the Department.

The Court left it to the jury to determine whether such fraud had been proved, and the jury found for the defendants.

Record, 35.

Argument and Points.

This action was brought upon an implied assumpsit to repay to the plaintiff the sum of $99,580.71, money "had "and received to and for the use of the plaintiff."

The money sued for was paid by the plaintiff to the defendants, from time to time, as compensation for carrying the mails from Lake City to Ouray, a distance of 110 miles.

The contract, or agreement, under which the service so paid for was performed was executed, and by its terms had expired long before this suit was brought.

It is not disputed (except with reference to the alleged omission of a few trips in October, 1878) that the mails were in fact transported over the route from Lake City to Ouray, by way of Barnum, a distance of 110 miles, in accordance with the contract for the performance of that service entered into by the Postmaster-General with the defendants; nor is it disputed that the money paid to the defendants became due and payable and was paid in accordance with the terms of the contract.

But it is claimed by the plaintiff—First: That of the sum of $99,580.71 so paid, the sum of $39,987.23 is recoverable

back because it was paid to the defendants for and in respect of additional service over the route from Lake City to Ouray by way of Barnum that was not performed.

Second: That the remainder of said sum of $99,380.91 paid to the defendants, as stated, that is to say, the sum of $59,592.98, is recoverable back as having been paid in excess of the amount legally allowable.

I.

THE SUM OF $39,987.39 PAID TO THE DEFENDANT IN RESPECT OF INCREASED SERVICE WAS PROPERLY AND LAWFULLY PAID AND CANNOT BE RECOVERED IN THIS ACTION.

The order of the Postmaster-General requiring the contractor to carry the mails from Lake City to Ouray by way of Barnum instead of by way of Mineral Point, and allowing to the contractors $10,663.26 per annum additional pay for service over the 110 miles increase in distance, was authorized by and in strict compliance with the provisions of the law.

The original contract referred to in the pleadings and in the testimony was made by the Postmaster-General for the transportation of the mails to and from Fort Garland and Ouray, places of commercial and geographical importance. One of the terminal points, Ouray, was a place of special importance with reference to the distribution of the mails through the extreme western part of Colorado. The route over which the service was to be carried between the terminal points was a regular mail route and was designated as number 38,146.

It was found practically impossible to send the mails from Garland to Ouray over the road passing through all the places named in the contract.

Between Mineral Point and Ouray there was a high range

of mountains, over which it was impossible to carry the mails during six months in the year. The impracticability of this part of the route and the injuries and inconvenience caused by the unavoidable interruption of the service were fully explained to the Postmaster-General, not only in the petitions of the citizens of Ouray, but also by the reports of the Department's special officers and employés, who recommended that the contractors should be required to carry the mails from Lake City to Ouray by *another road*, which was traversable during the whole year.

The distance from Lake City to Ouray by the road over the mountains was 46 miles; the distance between the same points by the traversable road which passed through Barnum was 110 miles.

The Postmaster-General therefore ordered that the service on that part of the route over which regular service was impossible, that is to say, between Mineral Point and Ouray, a distance of 10 miles, should be omitted; that the service between Lake City and Mineral Point should be reduced, and the service from Lake City to Ouray should be changed so as to include Barnum, between Lake City and Ouray.

This required the contractors to traverse a road from Lake City to Ouray, 110 miles in length, and the Postmaster-General allowed them $10,663.26 additional pay for and in respect of the 110 miles increase in distance.

The right of the Postmaster-General to make this change as to the road over which the service was to be performed between the designated terminal points of the route cannot be doubted. It is not understood that it is questioned by the plaintiff in error.

His action in respect of the change made was plainly within the general scope of his authority as defined by statute, and was expressly provided for by the regulations

then in force and by the very terms of the contract made with the contractors by the Postmaster-General.

The management of the mails and post-roads is committed to the Post-Office Department, and the Postmaster-General is given express authority to establish post-offices at such places on post-roads established by law as he may deem expedient (R. S., 3829), to discontinue a post-office (R. S., 3864), to establish branch offices (R. S., 3871), to discontinue a post-road when, in his opinion, it cannot be safely continued (R. S., 3974), and to prescribe regulations not inconsistent with law for the government of the Department and the distribution and performance of its business (R. S., 161).

By section 263 of the regulations of 1873, which were made by the authority of the statute referred to and had the effect of law, it was provided that—

"The Postmaster-General may order an increase or extension of service on a route by allowing therefor a *pro rata* increase on the contract pay. He may change schedules of departure and arrivals in all cases, and particularly to make them to conform to connections with railroads, without increase of pay, provided the running time be not abridged. He may also order an increase of speed, allowing, within the restrictions of the law, a *pro rata* increase of pay for the additional stock or carriers, if any. The contractor may, however, in the case of increase of speed, relinquish the contract by giving prompt notice to the Department that he prefers doing so to carrying the order into effect. The Postmaster-General may also discontinue or curtail the service, in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as a full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a *pro*

"*rata* compensation for the amount of service retained " and continued."

The power thus conferred on the Postmaster-General to " increase the service " by increasing the distance to be travelled, as well as by increasing the number of trips between the terminal points and post-offices on established routes, is recognized and regulated by the statute which limits the maximum of allowance for increased service to the proportion which the original compensation bears to the original service.

Section 3960 of the Revised Statutes provides that—

" Compensation for additional service in carrying the " mail shall not be in excess of the exact proportion which " the original compensation bears to the original service, " and when any such additional service is ordered the sum " to be allowed therefor shall be expressed in the order " and entered upon the books of the Department, and no " compensation shall be paid for any additional regular " service rendered before the issuing of said order."

If it be admitted, as it must be admitted, that the Postmaster-General had authority to require the contractors to carry the mails from Lake City to Ouray, by way of Barnum, 110 miles, the only question in relation to the validity of the order now under consideration is whether or not the sum of $10,663.26, allowed as compensation for this increased service, was in excess of the exact proportion which the original compensation bore to the original service. The method of ascertaining the amount payable in respect of the 110 miles of additional service was a very simple one.

The distance between the terminal points, Garland and Ouray, over the route and through the places designated in the original contract, was 196 miles, and for carrying

the mails seven times a week over this distance the contractors were entitled by the contract to $19,000 per annum, which was at the rate of $96.93 per mile. The Postmaster-General held that the additional service should be paid for at that rate per mile. He allowed to the contractors for each of 110 miles of additional service $96.93, making the sum of $10,663.36, mentioned in the order.

It is submitted that this was in strict compliance with the requirements of the statute, and that the sum so allowed and paid was in the exact proportion which the original compensation bore to the original service.

II.

THE SUM OF $59,592.98 PAID TO THE DEFENDANTS IN RESPECT OF THE EXPEDITED SERVICE FROM LAKE CITY TO OURAY BY WAY OF BARNUM 110, WAS PAID IN PURSUANCE OF ORDERS MADE BY THE POSTMASTER-GENERAL IN THE EXERCISE OF AUTHORITY CONFERRED BY LAW, AND IN THE EXERCISE OF HIS JUDGMENT AND DISCRETION AS TO MATTERS OF LAW AND FACT REQUIRING HIS OFFICIAL DETERMINATION. HIS ACTION WAS NOT THEREFORE REVIEWABLE BY THE COURT BELOW, NOR BY THE JURY, NOR IS THE MONEY SO PAID RECOVERABLE BACK IN THIS SUIT.

All the instructions asked by the plaintiff in the court below are based on the theory and contention that it was the right and duty of the jury to inquire into and determine the *questions* of *fact* on which the action of the Postmaster-General was based. That is to say, it was the right and duty of the jury to determine from the evidence whether or not the number of men and horses which the Postmaster-General found to be necessary for the performance of a certain service were in truth really necessary for the performance of that service, and to determine what number of men and horses were, in their opinion, necessary

for the performance of said service, and also what was the character of the roads over which the service was to be performed, and what would be a fair compensation for the service performed.

It was also claimed that it was the duty of the Court to review the decision of the Postmaster-General as to the *pro rata* pay to be allowed for the expedited service and the proper method of ascertaining it, and to instruct the jury that his construction of the law was erroneous and his action illegal.

That this view of the law is untenable and wholly at variance with the doctrines established by the decisions of this Court is, we think, demonstrable.

It is to be noticed that in the statutes creating and regulating the powers and duties of the Postmaster-General, as in the practical conduct of the business of the Department, a plain distinction is made between the *increase* or *addition* of service and the *expedition* of service.

When *additional* service is ordered, the compensation therefor cannot be in excess of the exact proportion which the original compensation bears to the original service.

The fixing of the compensation for the increased service is, therefore, a matter of merely arithmetical computation.

But the compensation for *expedited* service is determinable in a very different way.

Section 3961, R. S., provides that—

"No extra allowance shall be made for any increase of "expedition in carrying the mail unless thereby the em- "ployment of additional stock and carriers is made neces- "sary, and in such case the additional compensation shall

" bear no greater proportion to the additional stock and " carriers necessarily employed than the compensation in " the original contract bears to the stock and carriers " necessarily employed in its execution."

In the administration of this law, it is the duty of the Postmaster-General to investigate and determine—

1. Whether or not the public interests and conveniences require the service to be expedited, and if so, to what extent and between what points?

2. What number of men and horses are *necessarily* used in the performance of the service which is to be expedited?

3. Whether or not the proposed expedited service will necessarily require the employment of additional men and horses, and the number of men and horses that will be required?

4. What the proportion is between the number of men and horses necessarily used in the original service and those it will be necessary to be used in performing the expedited service?

When he has determined whether the employment of additional stock and carriers is made necessary by the proposed expedition and what additional stock and carriers will be required for the expedited service, the provisions of the statute limit his power in fixing the new rate of compensation to the proportion that the compensation in the original contract bears to the number of horses used in its execution.

The statute contains no other limitation of his power, nor does it any way qualify his right to determine absolutely and finally the question of the necessity for the employment of additional horses and men, nor does it give any person or tribunal any right to review or reverse his finding and conclusion on that question.

When, in the manner stated, he has determined what additional allowance he will make for the service to be expedited, it is his duty to communicate his decision to the contractor in order that the contractor may, if he is unwilling to perform the service for the proposed compensation, relinquish the contract, as the contract itself provides he may do.

The present inquiry, therefore, is whether or not after the agreement proposed by the Postmaster-General has been accepted by the contractor, and the service provided for has been performed, a new inquiry can be made by a court and jury into the correctness of the findings of the Postmaster-General as to the number of men and horses actually and necessarily employed in a certain service and as to the reasonable worth of the service performed, and as to the legality of the allowance made.

The general doctrine that the action of an executive officer in exercising a discretionary power vested in him by law in determining mixed questions of law and fact committed to his judgment and discretion for decision is final and cannot be inquired into or reviewed by any other tribunal, in the absence of any law authorizing such review, is too well settled by the repeated adjudications of this Court to be now questioned.

In the early case of Martin *v.* Mott (12 W., 19), this Court said:

"Whenever a statute gives a discretionary power to any "person, to be exercised by him upon his own opinion of "certain facts, it is a sound rule of construction that the "statute constitutes him the sole and exclusive judge of "the existence of those facts."

The case of Belcher *et al. v.* Linn (24 H., 522) involved

the finality of the decision of appraisers empowered by statute to appraise, estimate, and ascertain the value of certain importations.

This Court held that in the absence of fraud their decision was final and conclusive, and said:

"As was said by this Court in Bartlett *v.* Kane (16 How., "272), the appraisers are appointed with powers, by all "reasonable ways and means, to appraise, estimate, and "ascertain the true and actual market value and wholesale "price of the importation. The exercise of these powers "involves knowledge, judgment, and discretion. We hold, "as was held in that case, that when power or jurisdiction "is delegated to any public officer or tribunal over a sub-"ject-matter, and its exercise is confided to his or their "discretion, the acts so done are in general binding and "valid as to the subject-matter. The only questions which "can arise between an individual and the public, or any "person denying their validity, are power in the officer and "fraud in the party. All other questions are settled by "the decision made or the act done by the tribunal or "officer, whether executive, legislative, judicial, or special, "unless an appeal or other revision is provided for by "some appellate or supervisory tribunal prescribed by law. "(United States *v.* Arredondo, 6 Pet., 691; Rankin *v.* "Hoyt, 4 How., 327; Stairs *v.* Peaslee, 18 How., 524.)

In the case of the United States *v.* Speed (11 Wall., 649), involving the construction of a statute which provided that whenever by reason of the presence of a military or naval force near any post-office unusual business accrues thereat, the Postmaster-General is required to make a special order allowing proportionably reasonable compensation to the postmaster, and for clerical services during the period of such extraordinary business, and also involving a statute which requires the Postmaster-General "to control *accord-*"*ing to law* * * * the allowance to postmasters," the

Court, concerning that section of the law which devolved the duty of making a special order for compensation, said:

"The section did not go further and prescribe rules to "govern the action of the Postmaster-General, nor did it "seek to interfere with the judicial discretion of that offi- "cer. Congress constituted him the sole judge to deter- "mine not only whether the exigencies in the case had "arisen, but if they had, the manner and extent of the "allowance, and it is not competent for court or jury to re- "vise his decision, nor is it re-examinable anywhere else, "as there is no provision in the law to that effect. It may "be safely laid down as a general rule, says Story, Judge, "'that where a particular authority is confided to a public "'officer, to be exercised by him in his discretion, upon "'an examination of facts, of which he is made the ap- "'propriate judge, his decision upon these facts is, in the "'absence of any controlling provisions, absolutely con- "'clusive as to the existence of those facts.'"

The effect to be given to the decisions and findings of the officers of the Executive Departments of the Government upon questions of law and fact committed to them for investigation and determination has been most frequently considered and defined by this Court in cases that have arisen in relation to the disposition of the public lands.

In the case of Schurtz *v.* The United States (102 U. S., 401), Mr. Justice Miller, in delivering the opinion of the Court, says:

"To the officers of the Land Department, among whom "we include the Secretary of the Interior, is confided, as "we have already said, the administration of the laws "concerning the sale of the public domain. * * * The "question whether any particular tract, belonging to the "Government was open to sale, pre-emption, or homestead "rights, is in every instance a question of law, as ap-

" plied to the facts, for the determination of those officers. " Their decision of such questions, and of conflicting " claims to the same lands by different parties, is judicial " in its character.

" It is clear that the right and the duty of deciding all " such questions belong to those officers, and the statutes " have provided for original and appellate hearings in " that Department before the successive officers of higher " grade up to the Secretary. They have, therefore, juris- " diction of such cases, and provision is made for the " correction of errors in the exercise of that jurisdiction. " When their decision of such a question is finally made " and recorded in the shape of a patent, how can it be " said that the instrument is absolutely void for such " errors as these? If a patent should issue for land in " the State of Massachusetts, where the Government never " had any, it would be absolutely void. If it should issue " for land once owned by the Government, but long be- " fore sold and conveyed by patent to another who held " possession, it might be held void in a court of law on " the production of the senior patent. But such is not " the case before us. Here the question is whether this " land has been withdrawn from the control of the Land " Department by certain acts of other persons, which in- " clude it within the limits of an incorporated town. The " whole question is one of disputed law and disputed " facts. It was a question for the land officers to con- " sider and decide before they determined to issue Mc- " Bride's patent. It was within their jurisdiction to do so. " If they decided erroneously, the patent may be voidable, " but not absolutely void."

In the later case of Steel *v.* Smelting Company (106 U. S., 450), the subject is again reviewed. The Court, by Mr. Justice Field, says:

" We have so often had occasion to speak of the Land " Department, the object of its creation, and the power it " possesses in the alienation by patent of portions of the " public lands, that it creates an unpleasant surprise to find

"that counsel, in discussing the effect to be given to the "action of that Department, overlook our decisions on the "subject. That Department, as we have repeatedly said, "was established to supervise the various proceedings "whereby a conveyance of the title from the United States "to portions of the public domain is obtained, and to see "that the requirements of the different acts of Congress are "fully complied with. Necessarily, therefore, it must con- "sider and pass upon the qualifications of the applicant, "the acts he has performed to secure the title, the nature "of the land, and whether it is of the class which is open to "sale. Its judgment upon these matters is that of a special "tribunal, and is unassailable except by direct proceedings "for its annulment or limitation."

The conclusions thus expressed are supported by a long line of decisions:

Johnson *v.* Towsley, 13 Wall., 72.
Warren *v.* Van Brunt, 19 Wall., 653.
French *v.* Fyan, 93 U. S., 169.
Marquez *v.* Frisbie, 101 U. S., 475.
Vance *v.* Burbank, 101 U. S., 514.
Quinby *v.* Colan, 104 U. S., 426.
Smelting Company *v.* Kemp, 104 U. S., 645.
Steel *v.* Smelting Co., 106 U. S., 451.
Baldwin *v.* Stark, 107 U. S., 464.
Ehrhardt *v.* Hogaboom, 115 U. S., 67.

The doctrine of these cases is, that when controverted questions of law and fact are committed by law to the decision of officers of the Land Department and decided by them, their decision is final to the same extent as those of other judicial or *quasi* tribunals; that is, they are final in the absence of fraud or mistake, and can be impeached and set aside for fraud and mistake only by proper proceedings in equity.

It is submitted that in the light of these authorities the action of the Postmaster-General and his decisions, expressed in the orders under consideration, were final and conclusive upon the matters of fact and of law therein involved, unless they were based upon fraud or mistake.

III.

THE ACTION OF THE POSTMASTER-GENERAL IN ALLOWING AND PAYING THE ADDITIONAL COMPENSATION RECEIVED BY THE CONTRACTORS FOR THE EXPEDITED SERVICE WAS SO FAR FINAL THAT IT CAN NOT BE REVIEWED OR IMPEACHED EXCEPT FOR MISTAKE OR FRAUD. THERE WAS NO "MISTAKE" COMMITTED BY THE POSTMASTER-GENERAL IN CONTEMPLATION OF LAW, AND THE QUESTION OF FRAUD WAS PROPERLY LEFT TO THE DETERMINATION OF THE JURY.

1. *As to the alleged mistake of fact.*

The *mistake* imputed to the Postmaster-General by the plaintiff in error was not committed directly in making the orders referred to nor in making payments thereunder, but in the preliminary inquiry and finding as to the *number of men and horses* necessary for the performance of a certain service. His decision on this point regulated and determined the *proportion* according to which the compensation was to be calculated.

If his finding as to the number of horses and men necessary for the work required was correct, there might yet have been a mistake committed in the computation and ascertainment of the proportion by which the allowance was to be governed; and if the *proportion* according to which compensation was to be made had been correctly ascertained, there might still have been a mistake in the computation and ascertainment of the precise amount payable to the contractor.

It is obvious that the mistakes last mentioned would be of a very different character from that which the Postmaster-General might commit in finding out and deciding what was a sufficient force for the required service. They would be mistakes within the meaning of that term as used in the authorities referred to; but a wrong conclusion in the preliminary inquiry as to the men and horses required for a certain service would not be a mistake in fact in a legal sense, but would be an error in judgment in relation to facts that were known to him and which it was his duty to know.

When an act is done intentionally and with knowledge, or with opportunities of obtaining knowledge, the doing of the act cannot be considered "a mistake."

The Postmaster-General made the order increasing the pay for increased speed in carrying the mail under the statute which required him to know the number of stock and carriers necessary, as the mail was then being carried, and necessary as it was proposed to be carried, and his official power in executing the authority thus given included, to the amplest degree, power to inform himself of the facts which were to govern his conduct when found. The Post-Office Department is furnished with a Bureau of Inspection, which is a part of the machinery of that Department, and is devoted to procuring and bringing before the Postmaster-General information upon all subjects necessary for him to act upon in the discharge of his official duties. The regulations of the Department make every postmaster at the termini of the routes and along the line of each route the trusted agent of the United States. These agents know the number of stock and carriers used on any route, and are capable of forming a correct or reasonably correct opinion of the number necessary in case of change of schedule. It is made the duty of the post-

office inspectors, who travel over the routes at short intervals, to know, among other things, the amount of stock and carriers employed, and the number of stock and carriers necessary for any increase of service. So that the element of ignorance of the truth, which lies at the very basis of the doctrine of mistake, as mistake is defined in Equity Jurisprudence, does not exist in this case, is not alleged to exist in the complaint, and, under the operation of the Department and its official machinery for collecting information, could not exist.

It is said by Justice Story (Equity Jurisprudence, sections 146 to 148) that where the means of information exist upon which the party acts, there can be in law and equity no mistake alleged concerning his action. This doctrine is fully declared in 93 U. S., in the case of Grymes *v.* Sanders, where it is held that mistake to be available in equity must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person.

See U. S. *v.* Griffith, 22 Ct. of Claims, R., p. 165, and cases there cited.

2. *As to the allegation of fraud.*

The fraud alleged to have been perpetrated by the defendants was the making and presentation of a false statement with intent to deceive the Postmaster-General.

The defendant, Sanderson, did make a statement to the Second Assistant Postmaster-General which he did not know to be true, and which was in fact untrue, but the making and presentation of that statement did not constitute a fraud in a legal sense.

It was the expression of a mere opinion or estimate,

as was apparent from the subject-matter, and was so understood by the official to whom it was addressed. A false statement made under such circumstances is not necessarily a fraudulent statement.

In the case of Page *v.* Bent (43 Mass., 374) the court said:

"But in a matter of *opinion, judgment*, and *estimate*, if "one states a thing as of his own knowledge, if he in fact "believes it, and it is not intended to deceive, it is not a "fraud, though the matter thus stated is not in fact true. "The reason is, that *it is apparent from the subject-matter* "that what is thus stated as to knowledge must be con- "sidered and understood, by the party to whom it is ad- "dressed, as an *expression of strong belief only*, because "it is a *subject-matter* of which knowledge, in the strict "sense, cannot be had."

In Marshall *v.* Hubbard (117 U. S., 415), with reference to the defendant's proofs to support a plea that a contract was obtained by false representation, this Court said:

"In the first place, it must be shown that the represen- "tations were made; in the second place, that the repre- "sentations, if made, *were fraudulent;* in the third place, "that the defendant relied upon the representations; and "in the fourth place, that he had a *right to rely upon them.* "Those are four material elements of fact that must appear "in the case. * * * Not only must the representa- "tions be made, not only must they be *fraudulent*, not "only must it appear that the party *relied*, and had a *right* "to rely, upon them, but it must also be shown that the "representations were material to the contract or trans- "action which took place between the parties; and further, "that injury has been sustained and damage resulted to the "defendant from the alleged fraudulent representations."

In Smith *v.* Richards (13 Peters, 37) it is stated :

" In the next place, the misrepresentation must not only " be in something material, but it must be in *something in* " *regard to which the one party places a known trust and* " *confidence in the other.* It must not be a mere matter of " *opinion equally open to both parties for examination and* " *inquiry, and where neither party is presumed to trust the* " *other, but to rely on his own judgment.*"

Where parties standing in adverse relations to each other, and the subject-matter of their dealings is equally open to both for examination and inquiry, neither party is presumed to trust the other, but to rely on his own judgment.

Blease *v.* Garlington, 94 U. S., 1.

In the present case there was no evidence tending to prove that the representations made by Sanderson were relied on by the Postmaster-General, nor that they were made with intent to deceive. It appears affirmatively that the Postmaster-General had no right to rely upon them, and in fact knew that they were made merely as estimates and as the expression of an opinion.

But if it be conceded that the defendant's purpose was fraudulent, the judge's charge fully and fairly submitted to the jury the only question of fraud raised by defendant's conduct.

A careful examination of the record will show there was no evidence that tended to show any fraudulent purpose on the part of the defendant, except on the assumption that there was collusion between him and the officers of the Department.

The statement of Sanderson refers to the " present sched- " ule of 72 hours," whereas, in fact, no such schedule

existed and no service was established over the road to which that statement referred.

But it was known by the Postmaster-General, or his Assistant, that no such schedule existed and no such service had been established, because he alone could fix the schedule and direct the service, and knew that he had not taken any such action.

In the same statement, Sanderson represented that it would require 66 horses and 22 men to perform the "same "service" referred to in the first paragraph of his letter, whereas, in fact, there was at that time no such service as that mentioned, and Sanderson did not know what number of men and horses were necessary to perform the expedited service to which the letter had reference.

But the Post-Office Department officials knew that the service described as "the same service" was hypothetical and constructive, and that Sanderson had no personal knowledge as to the number of horses and men necessary to perform the expedited service.

It is apparent, also, from the record that 66 horses and 22 men were not required and were not used in the performance of the expedited service.

But the Postmaster-General had full opportunity to know, and it was his duty to ascertain from sources other than the information obtained from the defendant, what force was necessary and was actually employed in respect of the expedited service.

It is shown by the testimony set out in the bill of exceptions that the proposed change in the service was brought to the attention of the defendants by the Second Assistant Postmaster-General, at Washington, and they were asked if they were willing to do the service in the way proposed; that the statement of Sanderson was made at the request of the contract clerk of the Post-Office De-

partment; that the schedule referred to in the statement was fixed by the chief clerk and the Second Assistant Postmaster-General, and the defendants had nothing to do with fixing it; that the data from which the statement was made was furnished by the contract clerk of the Post-Office Department through maps, figures, and petitions on file; that neither of the defendants had ever been over the proposed road, and they could only make a "jump" at the cost of service, and the Department was so informed; that the statement furnished to the Department was merely an *estimate* or expression of opinion as to the number of stock and men required, and was so taken and understood by the Department; that the defendants were informed by the Department that no mails had ever been carried over the proposed road; that neither of the defendants knew anything about the practicability of the route that was recommended, but based all they did upon the information that the Department gave them; that from his experience as a mail contractor and with the creation of new routes in new Territories, the defendant, Sanderson, considered that the estimates by him were at that time fair; that he admitted that in view of facts subsequently ascertained he was mistaken.

There was no evidence introduced to contradict or impeach the testimony, the substance of which has been above stated; nor, as has been already said, was there any evidence offered to show that the statement made by the defendant, Sanderson, actually misled the Postmaster-General or that they were made the basis of his action.

In view of the evidence set out in the bill of exceptions the conclusion is unavoidable that all the circumstances and conditions involved in the conduct of the defendants in making the statement in question were perfectly well known and understood by the Postmaster-General or As-

sistant Postmaster-General, and that if the conduct of the defendants was *fraudulent*, then the intended fraud must have been known by and consented to, if not participated in, by the officers of the Post-Office Department. That is to say, the evidence relied on to prove fraud necessarily affected and involved the officers of the Post-Office Department to the same extent that it involved the defendants.

The making of the statement was in pursuance of the request of the officers of the Department, and the origin and basis of their representations were known to the officers of the Department. If, therefore, there was any fraud in their action or in their representations, it was in its *origin* and *execution* as much the fraud of the officers of the Post-Office Department as of the defendants.

The Court, therefore, was correct in charging that the Government could not recover unless there was fraud, " and in the *circumstances of the case*, a fraud that was " participated in, which was countenanced and recognized, " by the officers of the Government."

The Court was correct in this definition and qualification of the fraud, because the " circumstances of the case " made it apparent that there could have been no fraud in obtaining the contract under which the money sought to be recovered was paid unless the defendants and the officers of the Post-Office Department were jointly concerned and participants therein.

Whether or not there was such a fraud the Court left to the jury to determine, with the further instruction (which was not excepted to) as follows :

" The testimony as to the force actually used was given " only to explain how the parties must have understood " it at the time this contract was made. That is to say, " persons familiar with this service, the Postmaster-Gen- " eral himself, or the men in his office, must have known

" something about what force was required to carry mail
" 110 miles, letting as many mail contracts as they do;
" certainly the defendants knew all about it, and if they
" stated the force in excess of what the service actually re-
" quired for the purpose of getting an extraordinary com-
" pensation, and there was an intention on their part at
" that time and an intention on the part of the office let-
" ting the contract that they should have extraordinary
" compensation for this service, then the Government may
" recover. That is a question for your consideration."

IV.

THE MONEY SUED FOR CANNOT BE RECOVERED IN THIS ACTION UNDER OR BY REASON OF THE PROVISIONS OF SECTION 4057 OF THE REVISED STATUTES.

In the brief filed on behalf of the plaintiff in error, the plaintiff's right of action is not based upon the principles of common law applicable to cases of the payment and receipt of money in mistake and fraud, but wholly on the provisions of sections 3960, 3961, and 4057 of the Revised Statutes.

It is insisted that as the power of the Postmaster-General in fixing the allowance for expedited service is limited by section 3961 to the additional carriers and stock *actually necessary* for the performance of the service, the allowance made by him must be considered as pay for the actual use of a definite number of men and horses, and if payment is made for a number of men and horses in *excess* of the number actually necessary, the money so paid is paid in violation of law and can be recovered back under the provisions of section 4057.

It is insisted, also, that, although the duty of inquiring and deciding what additional carriers and stock are necessary for the performance of the proposed service is im-

(*c.*) He is to sue in all other cases where money has been paid in consequence of *fraudulent representation*, or by *mistakes collusion* or *misconduct* of any officer or other employé of the postal service. Taken in its very broadest sense, this means nothing more than that money paid in mistake and fraud can be recovered back.

We therefore submit that the provisions of section 4017, whether considered separately or collectively, do not give to the Government any new rights or remedies, nor do they in any way enlarge or modify the general doctrine hereinbefore discussed, that the decisions of the officers of Executive Departments on questions of fact as well as on questions of fact and law requiring official determination and action are unimpeachable, except for fraud and mistake. We have heretofore shown, as we think, that the facts of this case do not bring it within the operation of the general principle already referred to relative to mistake and fraud.

We also submit that in the absence of some plain and unmistakable statutory requirement this Court will be reluctant to hold that the mere allegation that the Postmaster-General has made errors in computations in estimates, and in decisions concerning the existence or non-existence of certain facts, authorize the Federal courts, with the aid of juries, to investigate his alleged errors and mistakes and adjudicate thereon as though an appeal from his action was expressly provided for.

This would be to substitute the courts for the Post-Office Department in the administration of the Department in all matters involving the contractual relations of the Department with its contractors.

The exercise of such a jurisdiction with reference to the number of horses and men necessary for the performance of any particular service would necessarily involve inquiry,

years after the service was performed, into the condition of roads, the facilities for obtaining supplies, and the *kind* as well as the *number* of vehicles, stock, and carriers actually employed; for it obviously results from the argument on behalf of the Government that if no *men* and no *horses* were used in the service the contractor would be entitled to no pay, even if the mails were transported by some other method on schedule time without failure or delay.

It would also involve, as is indeed claimed in the eighth instruction asked in behalf of the plaintiff, the determination by a jury of the reasonable worth of service long before rendered with reference to all the circumstances under which the service was performed.

It is believed that no such right of supervision and control by the judicial authority over the details of executive administration has ever before been asserted. It has no foundation in law nor in the decisions of the Court, nor in the practice of the Government from the time of its organization.

It cannot exist in the face of that provision of the contract which gives the contractor the *right* to *refuse* to perform the expedited service if not satisfied with the compensation offered to him.

All the instructions asked on behalf of the plaintiff were based upon an erroneous theory of the law and were properly refused.

V.

THE COMPLAINT DOES NOT SET OUT ANY PROMISE TO PAY THE MONEY ALLEGED TO HAVE BEEN RECEIVED TO THE USE OF THE PLAINTIFF.

When the case shows that it is the duty of the defendant to *pay*, the law imputes to him a promise. "*This*